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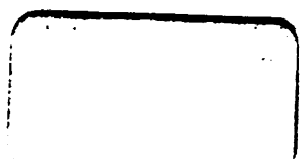
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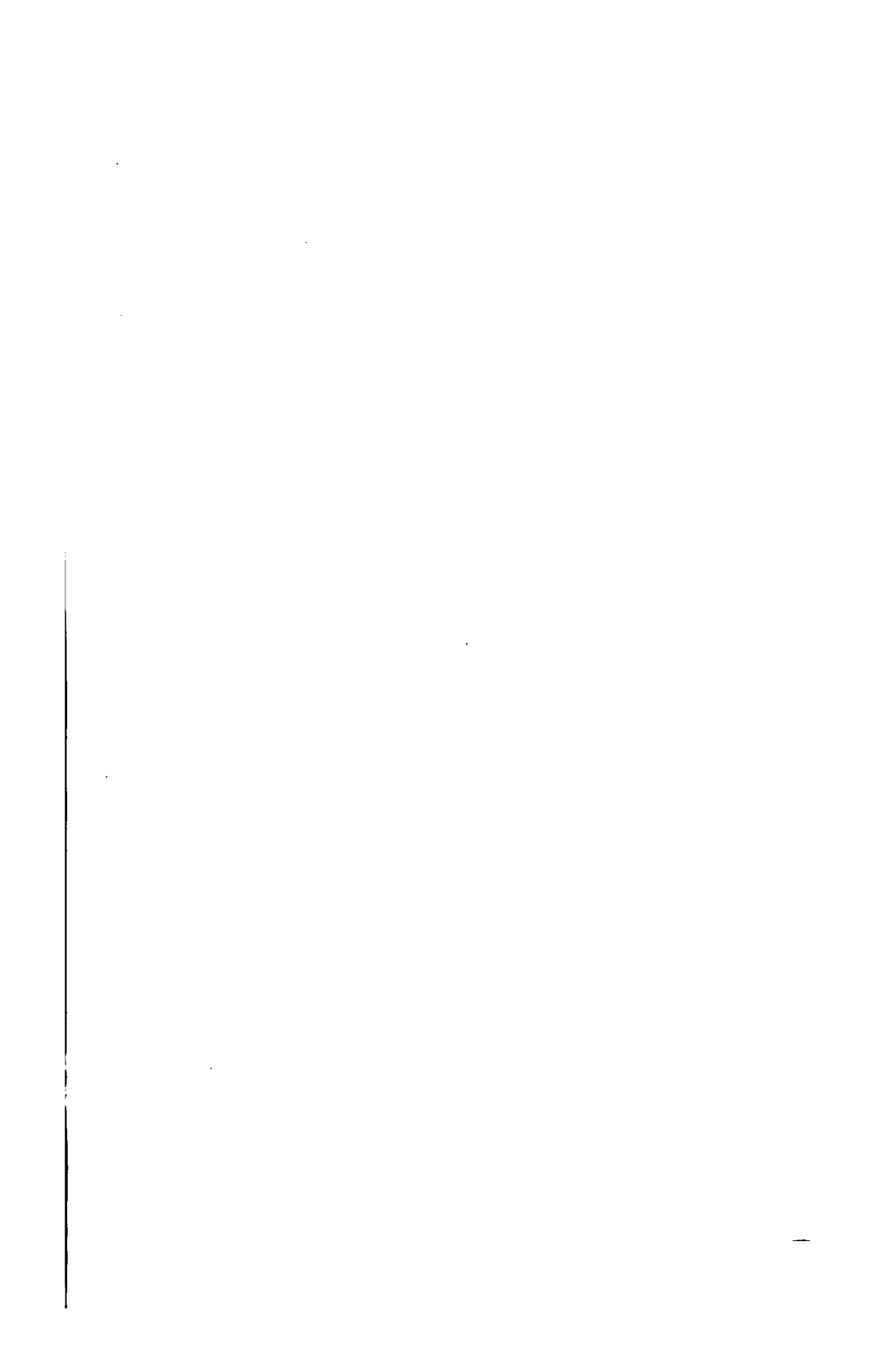
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**REPORTS**  
**OF**  
**CASES ARGUED AND ADJUDGED**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**THE UNITED STATES,**  
**JANUARY TERM, 1847.**

**By BENJAMIN C. HOWARD.**  
COUNSELLOR AT LAW, AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE  
UNITED STATES.

**VOL. V.**

**SECOND EDITION.**  
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**HON. JOHN CATRON, Associate Justice.**

**HON. JOHN McKINLEY, Associate Justice.**

**HON. PETER V. DANIEL, Associate Justice.**

**HON. SAMUEL NELSON, Associate Justice.**

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**For the 2d Circuit. The Honorable SAMUEL NELSON.**  
**For the 3d Circuit. The Honorable ROBERT C. GRIER.**  
**For the 4th Circuit. The Honorable ROGER B. TANEY, C. J.**  
**For the 5th Circuit. The Honorable JOHN MCKINLEY.**  
**For the 6th Circuit. The Honorable JAMES M. WAYNE.**  
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**For the 9th Circuit. The Honorable PETER V. DANIEL.**



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# THE DECISIONS

OF THE

## SUPREME COURT OF THE UNITED STATES,

AT

### JANUARY TERM, 1847.

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**JAMES WOOD, PLAINTIFF IN ERROR, v. WILLIAM A. UNDERHILL AND ASCHEL H. GEROW, DEFENDANTS.**

In order to obtain a patent, the specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention, without making any experiments of his own.<sup>1</sup>

<sup>1</sup> CITED. *Hogg v. Emerson*, 6 How., 484.

This case is reported in full in 2 Robb's Patent Cases, 588. The specifications for a patent are to be construed together, in order to ascertain the subject-matter of the invention. The specification may control the generality of the terms of the patent, of which it forms a part. *Whittemore v. Cutter*, 1 Gall., 429, 437; *Pitts v. Whitman*, 2 Story, 609, 621; *Barrett v. Hall*, 1 Mass., 447; even to the extent of enlarging the recitals of the patent. *Hogg v. Emerson*, 6 How., 437, 479. So are the drawings a part of the patent, which were filed with the application. *Earle v. Sawyer*, 9 Mass., 9; *Washburn v. Gould*, 3 Story, 122, 133; *Brooks v. Bicknell*, 3 McLean, 260, 261; *Davis v. Palmer*, 2 Brock. 298; *Davoll v. Brown*, 1 Woodb. & M., 53, 56; *Emerson v. Hogg*, 2 Blatchf., 1; s. c., 6 How., 437; *Carver v. Bromptree Manufacturing Co.*, 2 Story, 434; *Lowell v. Lewis*, 1 Mass., 189.

If there is a clear repugnancy between the patent and the specification, the patent is void. *King v. Wheeler*, 2 Barn. & Ald., 45; *Cook v. Pearce*, 8 Ad. & El. (N. S.), 1044.

But the courts will construe the patent and the specification liberally. *Ames v. Howard*, 1 Sumn., 482; *Blanch-*

*ard v. Sprague*, 3 Id., 535; *Ryan v. Goodwin*, Id., 514; *Wyeth v. Stone*, 1 Story, 270; *Davoll v. Brown*, 1 Woodb. & M., 57; but they are not to be treated as monopolies, and if the claim immediately follows the description, it may be construed in connection with the explanation contained in the specification, and be controlled accordingly. *Turrill v. Michigan Southern &c. R. R. Co.*, 1 Wall., 491; *Turrill v. Illinois Central R. R. Co.*, 3 Fish. Pat. Cas., 330.

The object of the specification is to inform the public exactly what is patented. *Evans v. Eaton*, 7 Wheat. 356; *Kay v. Marshall*, 2 Webs. Pat. Cas. 39; *Blake v. Stafford*, 3 Fish. Pat. Cas., 294; *Bloxam v. Elsee*, 1 Car. & P., 558.

The party's claim cannot be left to minute references or conjectures. *Lowell v. Lewis*, 1 Mass., 182; or a general statement that the patented machine is in all respects an improvement of the old. *Kweass v. Schuykill*, 4 Wash., 669; *Barrett v. Hall*, 1 Mass., 447. On construing the claim, the whole language used is to be construed together, and not single phrases picked out and construed by themselves. *Ames v. Howard*, 1 Sumn., 482; the drawings with the words. *Bloxam v. Elsee*, 1 Car. & P., 558. The specification should be so con-

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Wood v. Underhill et al.

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If the patent be for a new composition of matter, and no relative proportions of the ingredients are given, or they are stated so ambiguously and vaguely that no one could use the invention without first ascertaining, by experiment, the exact proportion required to produce the result, it would be the duty of the court to declare the patent void.

But the sufficiency of the description in patents for machines, or for a new composition of matter, where any of the ingredients do not always possess exactly the same properties in the same degree, is, generally, a question of fact to be determined by the jury.<sup>2</sup>

Where a patent was obtained for a new improvement in the mode of making brick, tile, and other clay ware, and the process described in the specification was, to mix pulverized anthracite coal with the clay before moulding it, in the proportion of three fourths of a bushel of coal-dust to one thousand brick, some clay requiring one-eighth more, and some not exceeding half a bushel, this degree of vagueness and uncertainty was not sufficient to justify the court below in declaring the patent void.

The court should have left it to the jury to say, from the evidence of persons skilled in the art, whether the description was clear and exact enough to enable such persons to compound and use the invention.

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strued as will, consistently with the fair import of language, make the claim co-extensive with the actual discovery. *Haworth v. Hardcastle*, 1 Webs. Pat. Cas., 480; *Holmes v. London & N. W. Ry. Co.*, 12 Com. B., 831; s. c., 16 Eng. L. & Eq., 409; see *Telley v. Easton*, 22 Eng. L. & Eq., 321; *Allen v. Rawson*, 1 M. G. & S., 551.

The words must be construed with reference to their meaning at the date of their use. *Elliot v. Turner*, 2 M. G. & S., 446.

The description must not be vague. *Turner v. Winter*, 1 Webs. Pat. Cas., 80; *Bickford v. Skewer*, Id., 218; *King v. Arkwright*, Id., 70.

When the patentee states the substances which he makes use of himself, and then all other substances which will produce the effect, and he claims them, by a generic description, or comprehended in his description, his claim is not void for ambiguity, if the combination is new in respect to all the substances thus referred to. *Ryan v. Goodwin*, 3 Sumn. 514.

But a specification that creates in the mind of one applying it any doubt as to the relative proportion of the ingredients, is void. *Muntz v. Foster*, 2 Webs. Pat. Cas., 85; *Tyler v. Boston*, 7 Wall., 327; *Whitney v. Mowry*, 3 Fish. Pat. Cas., 157; s. c., 2 Bond, 45; *Goodyear v. Wait*, 3 Fish. Pat. Cas., 242; s. c., 5 Blatchf., 468; *Goodyear v. New York Gutta Percha Co.*, 2 Fish. Pat. Cas., 312.

<sup>2</sup> It is a question for the jury to decide, even when the evidence of ex-

perts is introduced, whether the invention is described in such full, clear, and exact terms as will enable a skilful person to put it in practice from the specifications themselves. *Davis v. Palmer*, 2 Brock., 298; *Davoll v. Brown*, 1 Woodb. & M., 53; *Lowell v. Lewis*, 1 Mass., 182; *Washburn v. Gould*, 3 Story, 122; *Carver v. Braintree Manuf. Co.*, 2 Id., 432; *Walton v. Potter*, 1 Webs. Pat. Cas., 585, 595.

"It may not, perhaps, be easy to draw a precise line of distinction between a specification so uncertain as to claim no particular improvement, and a specification so uncertain as not to enable a skilful workman to understand the improvement and to construct it. Yet we think the distinction exists. If it does, it is within the province of the jury whether a skilful workman can carry into execution the plan of the inventor." *Davis v. Palmer*, 2 Brock., 298.

But in England it is held that the meaning of the specifications is for the court; and, although the question which goes to the jury is whether the directions in the specification are sufficient or not, it is necessary for the court to declare what the specification has said. *Neilson v. Harford*, 1 Webs. Pat. Cas., 295.

The question whether the invention disclosed by the specification is a proper subject for a patent, is a question of law. *Losh v. Hague*, 1 Webs. Pat. Cas., 202; *Howe v. Abbott*, 2 Story, 190; *Crane v. Price*, 1 Webs. Pat. Cas., 408.

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Wood v. Underhill et al.

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THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

It appeared that, in the year 1836, Wood took out amended letters patent for "a new and useful improvement in the mode of making brick, tile, and other clay ware," and filed the following specification of his invention: —

"Be it known that I, the said James Wood, have invented a new and useful improvement in the art of manufacturing bricks and tiles. The process is as follows: Take of common anthracite coal, \*unburnt, such quantity as will best suit the kind of clay to be made into brick or tile, [\*2 and mix the same, when well pulverized, with the clay before [it] is moulded; that clay which requires the most burning will require the greatest proportion of coal-dust; the exact proportion, therefore, cannot be specified; but, in general, three fourths of a bushel of coal-dust to one thousand brick will be correct. Some clay may require one eighth more, and some not exceeding a half-bushel. The benefits resulting from this composition are the saving of fuel, and the more general diffusion of heat through the kiln, by which the whole contents are more equally burned. If the heat is raised too high, the brick will swell, and be injured in their form. If the heat is too moderate, the coal-dust will be consumed before the desired effect is produced. Extremes are therefore to be avoided. I claim as my invention the using of fine anthracite coal, or coal-dust, with clay, for the purpose of making brick and tile as aforesaid, and for that only claim letters patent from the United States.

JAMES WOOD."

Dated 9th November, 1836.

In July, 1842, he brought a suit against the defendants in error, for a violation of this patent.

And at the trial the defendant objected to the sufficiency of the specification, "because no certain proportion for the mixture is pointed out, but only that such quantity of coal must be taken as will best suit the kind of clay to be made into brick or tile; but that clay which requires most burning will require the greatest quantity of coal-dust; the exact proportion cannot, therefore, be specified; but, in general, three fourths of a bushel of coal-dust to one thousand brick will be correct. Some clay may require one eighth more, and some not exceeding half a bushel; so that there is no fixed rule by which the manufacturer can make the mixture, but that must be ascertained by experiments upon the clay; and the claiming clause in the specification is only for the

abstract general principle of mixing anthracite coal-dust with clay, for the purpose of making brick, without any practical rule as to the proportions, which is too vague and uncertain to sustain a patent"; which objection was sustained by the court. The plaintiff excepted. And the verdict and judgment being against him, the case was brought here upon this exception.

The cause was argued by *Mr. Silliman*, for the plaintiff in error, and *Mr. Rowley*, for the defendants.

*Mr. Silliman*, for the plaintiff in error, made the following points:

The plaintiff insists, —

1. That he has in his specification given a general rule by which \*every kind of clay may be much better burned than by any previous process. And that the general proportions specified are, with some exceptions, the very best that can be used.

That a patent may properly be granted for a *beneficial general rule*, although there might be some exceptions to it not provided for.

2. That if it is necessary to entitle the plaintiff to a patent for a most beneficial invention for burning clay of the qualities usually found, that he should also discover the means of burning, to best advantage, clays of qualities not usually found; that his patent should not therefore be deemed void on its face, but he should be permitted to prove, by persons conversant with the business, that they could instantly determine, on inspection of clays of uncommon qualities, whether they required more or less than the usual burning, and how much more or less, so as to regulate the variation of proportions in such manner as to burn to the best advantage.

3. The plaintiff should have been permitted to show, under his specification by *experts*, that any kind of clay of which bricks can be made, however varied the qualities, can be better burnt under his general rule than by any previous process; and if such is the fact, the plaintiff should be entitled to a patent for the discovery, if he had given the general rule only, and had taken no notice of those exceptions, in which some uncommon kinds of clay can be best burned with a greater or less proportion of coal than that specified in the general rule.

4. The judge in his decision adopts all the errors of the defendants' objection, which states that there is no fixed rule by which the manufacturer can make the mixture, but that must be ascertained by experiments upon the clay. Suppose

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this to be so, and that the inventor has only furnished a guide by which such experiments can be successfully made, and that the subject, on account of the variable qualities of the materials, does not admit of greater certainty, and that by the simplest and cheapest experiments the manufacturer, in consequence of the plaintiff's invention, will be able to burn his bricks much better in less than half the time, and at less than half the cost of burning, by any other process, is not the inventor entitled to a patent for an invention practically so useful?

The fact that not a single brick has for some years past been burned, except according to the plaintiff's specification, is pretty good evidence that the manufacturers have been able to discover something from plaintiff's specification.

5. The objection, as adopted by the court, declares that the claiming clause in the specification is only for the abstract general principle of mixing anthracite coal-dust with clay, for the purpose of making bricks and tiles, without any practical rule as to the proportions, which is too vague and uncertain to sustain a patent. Suppose this objection true in point of fact, and that no information had \*been intentionally suppressed, and that the qualities of clay varied [\*4 so much that the proportions most useful could only be ascertained by an experiment on each bed of clay, it might, nevertheless, be a very useful invention, for which the inventor should be, in some measure, compensated by a patent. But this part of the objection is not true in fact, for the claiming clause is of the invention of using fine anthracite coal, or coal-dust, with clay, for the purpose of making brick and tile "as aforesaid." These words, "as aforesaid," refer to the general rule of three fourths of a bushel of coal for a thousand bricks, with the exceptions or variations previously expressed.

6. The judgment should be reversed, with costs, including the costs in the Circuit Court.

*Mr. Rowley*, for the defendant in error.

The patentee's specification is uncertain and insufficient. It furnishes no rule for making bricks, without the manufacturer's first making a series of experiments. The most it does is to prescribe in about what manner the trials are to be conducted; which is not enough to sustain his patent. *The King v. Arkwright*, Dav. Pat. Cas., 106 (per Buller, J.); *Turner v. Winter*, 1 T. R., 606 (per Ashurst, J.); *Boulton v. Bull*, 2 H. Bl., 484 (Buller, J.); *Harmer v. Playne*, 11 East, 101 (Lord Ellenborough); *The King v. Wheeler*, 2 Barn. &

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Ald., 345 (Abbott, Ch. J.); *Gods. Patents*, 85; *Lowell v. Lewis*, 1 Mason, 182 (Story, J.); *Langdon v. De Groot*, 1 Paine, 208; *Phill. Pat.*, 83, 267, 268, 283, 284, 289.

Mr. Chief Justice TANEY delivered the opinion of the court.

The question presented in this case is a narrow one, and may be disposed of in a few words.

The plaintiff claims that he has invented a new and useful improvement in the art of manufacturing bricks and tiles; and states his invention to consist in using fine anthracite coal, or coal-dust, with clay, for the purpose of making brick or tile; — and for that only he claims a patent. And the only question presented by the record is, whether his description of the relative proportions of coal-dust and clay, as given in his specification, is upon the face of it too vague and uncertain to support a patent.

The degree of certainty which the law requires is set forth in the act of Congress. The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without making any experiments of his own. In patents for machines the sufficiency of the description must, in general, be a question of fact to be determined by the jury. And this must also

\*5] be the case in compositions of matter, where any of the ingredients mentioned in the specification do not always possess exactly the same properties in the same degree.

But when the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent to be void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining by experiment the exact proportion of the different ingredients required to produce the result intended to be obtained. And if the specification before us was liable to either of these objections the patent would be void, and the instruction given by the Circuit Court undoubtedly right.

But we do not think this degree of vagueness and uncertainty exists. The patentee gives a certain proportion as a general rule; that is, three fourths of a bushel of coal-dust to one thousand bricks. It is true he also states that clay



which requires the most burning will require the greatest proportion of coal-dust; and that some clay may require one eighth more than the proportions given, and some not more than half a bushel instead of three fourths. The two last-mentioned proportions may, however, be justly considered as exceptions to the rule he has stated; and as applicable to those cases only where the clay has some peculiarity, and differs in quality from that ordinarily employed in making bricks. Indeed, in most compositions of matter, some small difference in the proportions must occasionally be required, since the ingredients proposed to be compounded must sometimes be in some degree superior or inferior to those most commonly used. In this case, however, the general rule is given with entire exactness in its terms; and the notice of the variations, mentioned in the specification, would seem to be designed to guard the brick-maker against mistakes, into which he might fall if his clay was more or less hard to burn than the kind ordinarily employed in the manufacture.

It may be, indeed, that the qualities of clay generally differ so widely that the specification of the proportions stated in this case is of no value; and that the improvement cannot be used with advantage in any case, or with any clay, without first ascertaining by experiment the proportion to be employed. If that be the case, then the invention is not patentable. Because, by the terms of the act of Congress, the inventor is not entitled to a patent unless his description is so full, clear, and exact as to enable any one skilled in the art to compound and use it. And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent. But this does not appear to be the case on the face of this specification. And whether the fact is so or not is a question to be decided \*by a jury, upon the evidence [\*6 of persons skilled in the art to which the patent appertains. The Circuit Court therefore erred in instructing the jury that the specification was too vague and uncertain to support the patent, — and its judgment must be reversed.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with

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costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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STEPHEN SEWALL, APPELLANT, v. HENRY V. CHAMBERLAIN.

Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed on motion, for want of jurisdiction.<sup>1</sup>

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama, sitting as a court of equity.

The facts in the case are sufficiently set forth in the opinion of the court.

*Mr. Dargan* moved to dismiss the appeal for want of jurisdiction.

*Mr. Justice WAYNE* delivered the opinion of the court.

This cause having been regularly docketed, the appellee now moves the court to dismiss the appeal, on the ground that the amount in controversy is not large enough to bring the case within the appellate jurisdiction of the Supreme Court.

We have examined the record and find it to be so. By the averments in the complainant's bill, it seems that the subject-matter in controversy between himself and the defendant re-

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<sup>1</sup> In a case in the Circuit Court the value of the matter in dispute must appear to be over \$500 to justify a removal from a State court to the Circuit Court, but it may appear by the *ad damnum* in the writ, when the declaration discloses no precise sum, or by the declaration in preference to the writ, if a sum certain be there claimed. And if any doubt exists, from the different counts claiming different sums, or the subject being real estate, what is the real amount in dispute, the court below may inquire into it by evidence. *Ladd v. Tudor*, 3 Woodb. & M., 325, 329.

Where, by an agreed statement of facts in the nature of a special verdict, the plaintiff's claim was admitted

by the defendant, except the sum of \$3134.20, it was held that that sum was the amount actually in dispute, and although judgment was rendered below for the entire claim, being more than \$5000, the writ of error was dismissed for want of jurisdiction. *Tintman v. National Bank*, 10 Otto, 6. Where, in replevin, judgment was rendered in favor of the plaintiff for a portion of the property delivered under the writ, and in favor of the defendant for a return of the residue, or its value, the same not being \$5000, and the plaintiff sued out a writ of error to the Supreme Court, it was held that the writ must be dismissed for want of jurisdiction. *Pierce v. Wade*, 10 Otto, 444.

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lates to the foreclosure of a mortgage given to the complainant by one Stephen Chandler, upon a lot of land in the city of Mobile, to secure the payment of a promissory note made by Chandler in his favor, bearing date 6th August, 1824, for \$485, payable on the 1st of March thereafter, which was not paid at maturity, for the collection of which the complainant made the defendant his attorney and agent; also to the purchase of the premises, under a decree for its sale, by the defendant, for one hundred and fifty dollars. The [\*7 decree of foreclosure, was for the sum of six hundred and twenty dollars ninety-one cents, and the complainant avers that the lot was a valid and sufficient security for the payment of his debt.

After setting out all the circumstances of his case, and specially interrogating the defendant, the complainant's prayer is, that the matter may be "referred to a master, to compute and report the amount found due your orator by the foreclosure decree, with the interest thereon, and also to compute and report the value of the mortgaged lot, and its value at the time it was sold and conveyed by the defendant to one Samuel P. Bullard (who is admitted by the complainant to be a *bond fide* purchaser of the lot from the defendant, without any notice of the complainant's equity), and that the defendant may be decreed to pay, either the amount of the said decree of foreclosure, and interest on the value of said lot of land, or the amount received by the defendant from the sale to Bullard, if the same were sold for its fair and full value, with all the profits and increase since made by the use of the money, or legal interest thereon, without any deduction of commissions for agency."

From this prayer, the complainant's demand is susceptible of definite computation, and as his recovery could not be extended to an amount above his first or alternative prayer, if the recovery in either case must be below the sum of two thousand dollars, as it would have to be upon his own showing, this court cannot have appellate jurisdiction of the cause. We shall direct the dismissal of the appeal.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, and it appearing to the court here that the matter in dispute does not exceed the sum or value of two thousand dollars, exclusive of costs, it is therefore

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now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed for the want of jurisdiction.

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### N. AND J. DICK AND COMPANY v. HARDIN D. RUNNELS.

By the 30th section of the Judiciary Act of 1789 (1 Statutes at Large, 88), depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken.<sup>1</sup>

A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred miles of such place, and that therefore no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good.

If either of the two facts, viz. that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void.

This case came up from the Circuit Court of the United States for the District of Mississippi, on a certificate of division in opinion between the judges thereof.

The only question involved was the construction of a part of the 30th section of the Judiciary Act of 1789 (1 Stat. at L. 88), which part is as follows. After providing for taking the testimony of persons "who shall live at a greater dis-

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<sup>1</sup> The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions; and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States. *Harris v. Wall*, 7 How., 693.

A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried. *Dun-*

*kle v. Worcester*, 5 Biss., 102; nor is it competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical. *Ib.*

After the deposition is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting shall show that fact, and that it was known to the opposite party in time to have had the witness subpoenaed. *Russel v. Ashley*, Hempst., 546.

The residence of the witness and the distance from the place are facts proper for the inquiry of the officer taking the deposition; and his certificate of those facts is competent evidence, and sufficient to authorize the deposition to be read. *Merrill v. Dawson*, Hempst., 663.

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tance from the place of trial than one hundred miles," the section proceeds thus: — "Provided, that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel."

On the trial of the cause, in June, 1838, the plaintiffs' counsel offered in evidence a deposition, attached to which was a certificate in these words, viz. : —

"And I, the said Paul Bertus, recorder of the first municipality, and acting mayor of the city of New Orleans aforesaid, do certify, that the deposition of the said William Christy was taken as aforesaid, because he, the witness, lives at New Orleans aforesaid, a greater distance than one hundred miles from Jackson, the place of trial of the suit or matter of controversy aforesaid, and I caused no notification of the time and place of the taking of said deposition to be made out and served upon Harden D. Runnels, the adverse party, or his counsel, to be present at the taking of said deposition, and to put interrogatories, if he or they thought proper, because neither the said Hardin D. Runnels nor his counsel live within one hundred miles of the place of caption to this deposition, being the place where the same is taken; and I do further certify, that the deposition was taken down by the witness, and signed by him in my presence, after being duly sworn; and I do further certify, that I am not of counsel or attorney to either of the parties aforesaid, or interested in the event of the cause or controversy aforesaid.

"In testimony whereof I have hereunto set my hand and seal, the day and year first before written.

[SEAL.]

Signed,

PAUL BERTUS,

*Recorder No. 1, Mayor pro tem."*

\*And thereupon a motion was made by the defendant's counsel to exclude the deposition, on the ground [\*9 "that the commissioner taking said deposition did not certify, that neither the said defendant or his attorney was within one hundred miles of New Orleans, the place of taking the deposition, at the time of taking the same."

Upon which question the judges were opposed in opinion, which is ordered to be certified to the Supreme Court of the United States, which is done accordingly.

*Mr. Bibb*, counsel for the defendant, submitted the case to the Court.

Mr. Justice McLEAN delivered the opinion of the Court.

The only point raised in this case is, whether the certificate of the officer who took the deposition objected to is sufficient. He states that he did not give the defendant Runnels, nor his counsel, notice, as neither lived within one hundred miles of the place where the deposition was taken. This may be true, it is alleged, and yet one or both of them might have been in New Orleans, or near to it, at the date of the certificate.

The law requires that a "notice shall be made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption," &c. The officer taking the deposition is presumed to know the residence of the party entitled to notice, as the person at whose instance the deposition is taken is bound to communicate that fact to him. But beyond this, he cannot be presumed to know or required to certify. If, in the words of the act, he certifies "that the adverse party or his attorney is not within one hundred miles," he is presumed so to state from the known fact that the residence of neither is within the distance specified. If the party or his counsel live within the hundred miles, a notice left at his residence would be good.

Where the party entitled to a notice lives more than one hundred miles from the place where the deposition is taken, and the officer so certifies, it would be sufficient, although it might be proved that such party was within the distance specified at the time, if the fact were unknown to the officer and the person in whose behalf the deposition was taken. The certificate may be controverted by parol proof, especially in regard to the facts stated of which the magistrate is not supposed to have official knowledge. And if it were made to appear that the person entitled to notice did not live one hundred miles from the place of the caption of the deposition, or if he were known to the magistrate or the party to be temporarily within that distance, where a notice might be served on him, though his residence might be more than one hundred miles distant, without a notice, the proceeding would be irregular and the deposition inadmissible.

\*10] \*Upon the whole, we think the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled.

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## ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the Judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

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THE UNITED STATES, APPELLANT, v. JOSEPH LAWTON,  
EXECUTOR OF CHARLES LAWTON, MARTHA POLLARD,  
HANNAH MARIA KERSHAW, WIFE OF JAMES KER-  
SHAW, ET AL.

A Spanish grant of land in Florida, for six miles square, "at the place called Dunn's lake, upon the river St. John's," is too vague to be confirmed, even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water-power.<sup>1</sup>

The river St. John's meanders so much that it is near Dunn's lake for thirty miles. The survey might therefore commence at any point of this distance with as much propriety as at any other point.

This concession cannot be distinguished from various others which have been brought before this court. The land granted was not severed from the king's domain. It remained a floating grant, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land.

Nor is the grant in this case aided by two surveys, one purporting to have been made in December, 1817, and the other in the spring of 1818. The first must have been fictitious, not actually made upon the ground, but merely upon paper; and the second was too imperfect to be effectual.

Previous to the act of May 26, 1824, Congress alone could act upon these incipient titles. By that act power was given to the court to pass a decree for the land, provided its locality, extent, and boundaries could be found. But, in the present case, this cannot be done.

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<sup>1</sup> An actual survey of an open and floating concession is a necessary ingredient to its validity; and it must also be an authorized survey to sever any land from the public domain; — so decided with reference to the Spanish claims. *Wherry v. United States*, 10 Pet., 338; *Smith v. United States*, Id., 327; *United States v. Forbes*, 15 Id., 180; *Buyck v. United States*, Id.,

215; *O'Hare v. United States*, Id., 297; *United States v. Delespine*, Id., 328; *United States v. Miranda*, 16 Id., 155; *United States v. Hanson*, Id., 198; *United States v. Clarke*, Id., 228; *United States v. King*, 3 How., 784; *Winter v. United States*, Hempst., 344, 383; *Glenn v. United States*, Id., 394; s. c., 13 How., 250; *De Villemont v. United States*, Hempst., 389.

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THIS was an appeal from the Superior Court of East Florida, under the following circumstances.

On the 10th of November, 1817, James Darley presented the following petition to Governor Coppinger.

“To his Excellency the Governor:

“Don James Darley, a native of Great Britain, with the respect due to your Excellency, says, that with the view of settling himself \*in this province under the protection of his \*11] Catholic Majesty, knowing the very great advantages that would result to the commerce of it from the article of lumber, if machinery for sawing is erected for sawing for the consumption of the province, as well as for exportation; and wishing to dedicate his attention and funds to this object, whenever he may be in possession of the necessary right, he asks and supplicates your Excellency will be pleased to grant to him from this time, in absolute property, six miles square of land, at the place called Dunn's lake, upon the river St. John's, for the purpose aforesaid of establishing said machinery; which favor he hopes to merit from the justice of your Excellency. St. Augustine, Florida, 10th of November, 1817.”

To which the following response was given:—

#### DECREE.

“*St. Augustine, 10th of November, 1817.*

“Taking into consideration the benefit and utility which ought to result to the improvement of this province by what the petitioner proposes, There are granted to him, in absolute property, the six miles square of land which he solicits for said water saw-mill, and that it may be effected let there be issued to him, from the secretary's office, a certified copy of this petition and decree, which will serve him as title in form.

COPPINGER.”

On the 21st of December, 1817, George Clarke, the surveyor-general, gave the following certificate of survey, accompanied by a plat.

“I, Don George Clarke, captain of the Northern District of East Florida, and by the government thereof appointed surveyor-general of said province, do certify that I have surveyed and delineated for Santiago Darley a square of six miles of land, equal to twenty-three thousand and four acres, on the west part of Dunn's lake, contiguous to the waters thereof, in its upper part, which lands were granted to him



by the government on the 10th of November of the present year. Said tract is conformable to the following plat, and to the copy thereof, which I keep. Northern District, 21st December, 1817."

On the 22d of May, 1819, the grantee filed his petition to the Superior Court of Florida, praying confirmation.

On the 12th of September, 1829, the District Attorney of the United States, Thomas Douglas, answered the above petition, denied generally the matters and things stated in it, of which he required proof, averred that the grant, if made, was in violation of the laws of Spain, and that the governor had no power to make it; that if made at all, it was made after the 24th of January, 1818, \*and antedated; that grants [\*12 for speculation were contrary to the policy of Spain, and void; that the grant, if made, was upon the condition that Darley would build a saw-mill, which he had not done; that the grant conferred no right to the soil, but only a right to cut pine-trees for the use of the mill, and averred that Darley was not a subject of the king of Spain at the date of the supposed grant, which circumstance, of itself, rendered the grant null and void.

On the 26th of May, 1830, Congress passed an act, the fourth section of which enacted as follows:—

"That all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of Congress approved 23d May, 1828."

On the 4th of January, 1834, the will of Darley was admitted to probate (he having died at some prior time which the record does not state), and letters testamentary were granted to Charles Lawton as executor.

On the 23d of July, 1834, the claimant's death was suggested, and the cause ordered to proceed in the name of Charles Lawton, executor.

On the 29th of July, 1834, Charles Lawton filed a bill of revivor on behalf of himself and the unknown heirs and devisees of the deceased.

On the 26th of August, 1834, the Attorney of the United States answered the bill of revivor, denying the right of Lawton to revive the suit, either for himself as executor, or on behalf of the unknown heirs and devisees.

On the 16th of June, 1841, a bill of revivor was filed on behalf of Joseph Lawton, executor of Martha Pollard, the widow of Jonathan Pollard, late of England, deceased; of James Kershaw and Hannah Maria Pollard, his wife; of

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Robert Mutrie and Sarah Pollard, his wife; of William Pollard and James Pollard, all of England, children of Martha Pollard, and heirs and legatees of James Darley, deceased.

On the 10th of July, 1841, the District Attorney of the United States filed his answer in the nature of a general replication, and on the 17th of July the cause came up for hearing.

On the 13th of September, 1841, the court pronounced a decree, from which the following is an extract.

"Without recapitulating the other proofs in the cause, it is sufficient for the present to say, that the claimants have made out a case, which entitles them to a confirmation of the title of the land granted, *provided* the identity of the land specified in the grant is such as to warrant a decree of confirmation; or, in other words, if \*the description of \*13] the land, as contained in the grant, is such that the land intended can be identified, located, and laid down by actual survey, according to the calls and manifest intention of the grant.

"The claimants have put in evidence a survey of a tract of land, made by George J. F. Clarke (formerly the Spanish surveyor-general of East Florida), bearing date the twenty-first day of December, 1817, and which, with the plat accompanying it, purports to be a survey and plat of the land in question. But there are objections to this survey of such a nature as to make it improper that an absolute decree should be made for the land therein described.

"First, it does not follow the calls of the grant, even if they can be followed at all; the grant is for the place called Dunn's lake, 'on the river St. John's.' There is as yet no proof that there is such a place '*on the river St. John's*'; but taking it for granted that there is such a place, which may be found, this survey does not appear to be at that place; it is not '*on the river St. John's*' at all.

"The location, it is true, appears to be on the west side of Dunn's Lake, and 'contiguous to the waters thereof in its upper part.' In the absence of any proof as to the geography of the country, if it should be said that the court should take notice of the maps of the surveyed part of the territory, as published from the land-office, it will be remarked that the maps of the country show that a lake, called Dunn's lake, does connect itself with the St. John's; but it will also appear that a square of six miles, bounded on the east by the upper end of the lake, will not extend to the river St. John's; and if it was the intention of the grant that the lands should lie

'upon the river St. John's,' such a location as is set forth in the plat and survey must of course be rejected.

"Whether the point of junction between the lake and the river is '*the place*' alluded to in the grant, it is not necessary now to determine (nor in fact can that point be determined without further proof); but if it is there, clearly the survey offered is not a survey or plat of the land granted.

"Secondly. The survey and plat are materially defective in other particulars. There is no well-defined corner, or permanent monument, mark, or boundary, which is known and established, or which can be found as a starting-point. The plat shows that the first corner is a stake in the swamp, near the margin of the lake, but whereabouts in the swamp, or how far from the head or the foot of the lake, does not appear; and all the other corners are represented to be stakes, but without marks, and their location entirely undefined; and the survey does not purport that the lines were ever run or marked; and even if it was conceded that *stakes* were set at the four corners of a tract six miles square, in that part of the country, in 1817, it could hardly be supposed that at this time \*they would furnish any aid to the person who should attempt to find the tract; but the [\*14 court cannot disregard the suggestion which has been repeatedly made in these land cases, with reference to Clarke's surveys, viz.: that they were not made in fact upon the land, but merely delineated on paper, particularly where that suggestion is strengthened by the internal evidence afforded by the survey itself. This plat and survey bill might easily have been made by Mr. Clarke without his ever seeing the land, and in the absence of any proof to show that any one corner, line, or mark, or boundary of this tract is now extant, or can be found, it would be very improper to confirm this survey.

"It must not be overlooked in the decision of these land cases, that although the equity and justice of the claim, or the validity of the grant alleged, is of primary importance, and the first thing to be ascertained, yet the exact location and boundaries of the tract in question are equally important, not only to the United States, but to the claimant; and it was one of the principal objects that the government had in view, in confiding the adjustment of these claims to this court, by the act of 1828 and 1830, that the extent, location, and boundaries of such grants as were found to be valid might be clearly ascertained, and fully and finally adjusted between the claimants and the government, so that the grants found to be valid might, with precision and accuracy, be severed from the remainder of the public domain, and that the

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proper officers of the government might know what lands belonged to the United States, and what might and could safely be sold by them.

"This was all-important to the correct operations of the land-office, and of deep concern to the claimants, and by the act of Congress the decree of this court is made final and conclusive upon the parties, unless appealed from. To make a decree, therefore, which merely settles the right of the claimant to a certain quantity of land in a certain neighbourhood, or section of the country, without clearly defining the locality, extent, and boundaries of such land, by proper and known or permanent landmarks and monuments, would seem to be a very incomplete fulfilment of the provisions of the statute, and to fall far short of the objects of the law. The surveys of these grants should be accurate, and defined by permanent corners, and the intersection of the lines of the tract with the lines of the government surveys should be clearly and accurately shown; or where this is not entirely practicable, some one or more of the corners of the tract or grant should be clearly defined by a permanent landmark or monument, and its course and distance from some corner of the public surveys accurately given, so that the lines of the tract may be seen therefrom without any difficulty.

"In this case, it may be that the survey was actually made, and that further proofs may show, that the lines and corners \*15] are now to be found, and that it is clearly within the calls of the grant; but if, on the other hand, it should appear that no survey was made, or that no corners or boundaries can be found, or, being found, that they are not within the calls of the grant, then it is a proper case for a survey before final decree, and one should be made; provided, upon proofs to be made respecting the region of country in which the grant is claimed, 'the place' designated in the grant can be found and identified; but if, on the contrary, it should appear that the place mentioned in the grant cannot be found, and that the description is too indefinite for a survey to be made, that the description lacks identity, or ascertainable locality, then of course the grant must be declared void for want of identity, and the claimants take nothing by their concession. *Forbes's case*, 15 Pet., 184, 185; *Arredondo's case*, 6 Id., 691; *Bucyk's case*, 15 Id., 223.

"With a view, therefore, of enabling the claimants to produce further proofs on these points, and to identify and locate the land claimed by actual survey, or otherwise, the decree must be suspended or postponed, and the cause continued.

J. H. BRONSON, *Judge.*"

On the 13th of November, 1841, the evidence of Mauricio Sanchez, Joseph S. Sanchez, and John M. Fontane was filed, in addition to that of Antonio Alvarez, all of which is as follows:—

Testimony of Antonio Alvarez, a witness produced, sworn, and examined on the part of the claimants.

Witness says, "I am keeper of the public archives of East Florida"; a certificate, with the name of Thomas de Aguilar signed to it, being shown to witness, he says, "this document was transferred to my office by the land-commissioners. It is in the handwriting of Thomas de Aguilar, and is signed by him. The certified copy here produced and filed in this cause (by me certified) is a true copy of this paper. This certificate of Aguilar came into my office in 1829, or early in 1830. This claim of Darley was filed before the board of land-commissioners, 29th November, 1823. The plat and survey, it appears, were filed with the commissioners on that day. I was in the secretary's office here in 1817. The paper which *we* used was from Havana; *we* usually got our paper there; never got American paper that I remember. The inhabitants here were in the habit of using American, or English, or Spanish paper. Paper imported from the United States was common in those days."

Being cross-examined, witness says, the paper on which the Aguilar certificate is written is Spanish paper. The survey is on American paper. Clarke did not do his business in the secretary's office.

Testimony of Mauricio Sanchez, Joseph S. Sanchez, and John \*M. Fontane, witnesses produced, sworn, and [\*16 examined on the part of the claimants.

Mauricio Sanchez, sworn, says, "I know the lake called Dunn's lake; have known it about fourteen years. It is on the east side of the St. John's river, and about fifty miles southwest of St. Augustine. I know of no other lake of that name; it empties into the St. John's. The lake is about fifteen miles long, and about three or four miles wide. I lived on the lake with my uncle, Ramon Sanchez, above six or eight years. This is Dunn's lake on the St. John's."

Cross-examined by United States attorney.

Witness says, "From the river St. John's you go about ten miles through a deep creek to the lake. It is about five miles to Lake George. The St. John's river makes a bend west of this lake, and leaves a deep strip between it and the river St. John's. This strip of land is sometimes called Cows-neck, and sometimes Dunn's lake neck. There is a swamp on the west side of the lake, continuing eight or nine

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miles up from the mouth of the outlet. The spots of hard land, and some swamps and sawgrass," &c.

By the court.

"If I had a grant on Dunn's lake, I think I should have it lying on Dunn's lake. The strip, or Cows-neck, is from six to ten miles wide, perhaps more. The outlet of the lake, by the meanders, is about ten miles; in a straight line, perhaps six miles. This outlet is a narrow creek, very deep, sometimes an hundred yards wide, sometimes narrower."

Joseph S. Sanchez, being duly sworn, says:—

"I have known Dunn's lake for fifteen years. I have resided there, and know it well. It empties into the St. John's by a creek called Dunn's creek. The lake is east of the St. John's; it is about five or six miles from the St. John's. The widest part of the strip of land is near the beginning of the creek."

Cross-examined by counsel for the United States.

"I know of no place on the St. John's river called Dunn's lake, except this. The mouth of the outlet in the St. John's is about seven miles above Pilatka. From Hambly's store on the St. John's it is about seven or eight miles across to the lake; above there it is perhaps four or five. Dunn's creek is about twenty or thirty feet wide, and in going up into the lake, you go in a southeasterly direction, about ten miles by the meanders of the creek, and about seven miles in a straight line. The lake is about fifteen miles long, and about three miles wide on an average, and lies nearly north and south. A swamp extends up the lake about half way on the west side. Then there is some swamp, some hammock, and some hard land.

"The average width of the strip of land lying between the lake and river St. John's is about five miles. In some places, \*17] more. \*The widest part of the strip is at the north end of the lake. From the middle of the west side of the lake, I should think it would be about five and a half miles to the St. John's, and above that, the average width is about five miles between the lake and river St. John's.

"By Dunn's lake on the river St. John's, I understand, a Dunn's lake on the St. John's. But I know nothing about Dunn's lake."

John M. Fontane, being duly sworn, says:—

"I have seen a survey made for James Darley, by Geo. J. F. Clarke. I received fifty dollars from Darley for Clarke, for making this survey, by an order from Clarke, about 1820. I understood it was for making this survey.

"There is a Dunn's lake which empties into the St. John's.

It is the only one that I know of. I have never been there."

On the same day when this evidence was filed, viz. the 13th of November, 1841, the court passed an order to have the land surveyed. Owing to various impediments, this survey was not made until the 1st of July, 1843, nor returned to the court until the 1st of December, 1843. It was made by James M. Gould, the county surveyor of St. John's county, and upon its presentation was objected to by the counsel for the United States, because it did not conform to the grant, or to the calls of the grant. It was, however, allowed to be received in evidence, subject to the objection of the counsel for the United States, and without prejudice.

On the same day when the survey was returned, viz. the 1st of December, 1843, the counsel for the claimants offered the deposition of James Pellicier, taken under commission, which was read in evidence. The testimony and answers of the witness in this deposition were objected to by the counsel for the United States as being irrelevant and improper, and the whole evidence objected to as being incompetent. The counsel for claimants said, that he offered the deposition to show that there is such a tract of land, and to identify and locate it. The deposition was received, as tending to show that there is such a tract of land, &c., but subject to the objection of the counsel of the United States, as to its relevancy and effect.

The deposition was as follows:—

Interrogatories to be propounded to James Pellicier, a witness in the above-entitled cause, and to be taken before George R. Fairbanks, Esq., clerk, and to be used in evidence on the trial thereof.

First. Were you or not acquainted with James Darley in his lifetime? Where did he reside, previous to the year 1817, and was he or not a Spanish subject?

To the first interrogatory witness answers:—

"I was acquainted with James Darley in his lifetime. He resided in the city of St. Augustine, previous to the year 1817; he was a merchant at that time; I believe that he was a Spanish subject, and have no doubt of it." [\*18]

Second. Have you or not any knowledge of a concession of land made by the Spanish government to the said James Darley, on Dunn's lake?

To the second interrogatory he replies:—

"I understood from the said James Darley, at that time, that he had received a grant of land from the Spanish govern-

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ment, situated on Dunn's lake. I think I so understood from him about the early part of 1817, or the early part of 1818, I am not sure which. The quantity I think was six miles square, granted for a mill-seat, I think. It was a fact generally known in the neighbourhood where I lived, at Matanzas."

Third. Do you or not know of the survey of a tract of land on Dunn's lake, in favor of James Darley? If you do, say in what year that survey was made, who was the surveyor, and who the chain-carriers? Were you, and who else were, present at this survey; and what was the number of acres to be surveyed, as near as you can recollect?

To the third interrogatory he answers:—

"In the year 1818, I think in the early part, between the middle of March and the middle of April in that year, I was employed by Mr. James Darley in assisting him to make a survey of a tract of land claimed by him on Dunn's lake. Robert McHardy was the surveyor employed. Two black men, one called George Bulger, belonging to Mr. Bulger of St. Augustine, and Peter Survel, a free black mulatto, were the chain-carriers. I sometimes carried the compass, and sometimes the chain, as Mr. McHardy directed me. Mr. Gibson of Charleston, and Mr. Alexander of Charleston, were both present at said survey, and I understand are neither of them living. I cannot recollect the number of acres to be surveyed; I think it was six miles square."

Fourth. State where the surveyor commenced his survey, whether he made any marks, and what marks, and how far the survey extended, and what prevented the surveyor from extending his survey further. State all the particulars, and what marks, if any, you made on the line.

To the fourth interrogatory witness answers:—

"The surveyor commenced his survey on the edge of Dunn's lake, at the south end of Cowen's old field, as it was called by the guide, Peter Survel; we run the line from thence, from three quarters of a mile to a mile and a half, west from the lake, and blazed the trees with one or two chops above the blazes; these marks were made by me. And then, on account of some misunderstanding between Mr. Darley and

\*19] Mr. McHardy, the surveyor, \*the survey was stopped. The misunderstanding arose from Mr. McHardy's wishing to see the order of survey, which Mr. Darley refused to exhibit to him, although he said he had it with him; we then broke up the survey, and went back to Mr. McHardy's, on the Tomoka."

Fifth. Say if it was the north or south line that McHardy surveyed.



To the fifth interrogatory witness replies:—

"The line surveyed by Mr. McHardy was intended for the north line of the tract."

Sixth. Were you or not with James M. Gould, esquire, at the time he made a recent survey of a tract of land as claimed by the heirs of Darley? State whether or not you pointed out the starting-point of this survey; was it the same at which McHardy commenced; did you see any mark there, such as you judged to be the same that was made by McHardy, or not?

To the sixth interrogatory witness replies:—

"I was with James M. Gould, esquire, at the time he made a recent survey of a tract of land as claimed by the heirs of Darley. I showed Mr. James M. Gould the same point at which we had commenced the survey, when I was with Mr. McHardy. I saw and pointed out to Mr. Gould the same marks which I had made when I was with Messrs. Darley and McHardy. I showed him a blazed tree, as the starting-point."

Seventh. Did you or not see other marks? State all the particulars.

To the seventh direct interrogatory witness says:—

"I saw several blazes about the woods, but no other surveyor's marks. I did nothing more than to show them those old marks which I had made."

Eighth. State any other facts within your recollection.

To the eighth and last direct interrogatory witness says:—

"That I do not know any other matter or thing pertinent to, or relating to, the subject-matter of these interrogatories."

JAMES PELLICIER.

Cross-interrogatories to be propounded on behalf of the United States to James Pellicier, a witness for the petitioner in the above-entitled cause.

First. If you say that you know James Darley, please state whether he is now alive or dead, when and where he died, and his age at the time of his death, and your age now.

To the first cross-interrogatory witness replies:—

"I know James Darley. He died in St. Augustine, in the summer of 1832. I do not know of his age at the time he died; he must have been between forty-five and fifty years of age, when he died. I am nearly forty-seven years of age now."

\*Second. Where was said James Darley born; was he not born in Scotland, or in some other foreign country? [\*20

To the second cross-interrogatory witness answers:—

"I have heard Mr. Darley say that he was born in Eng-

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land; have often heard him say that he was of English birth."

Third. If you say that said James Darley was a Spanish subject, state how you know that fact; do you know it of your own knowledge?

To the third cross-interrogatory, witness answers:—

"I have no other knowledge of James Darley being a Spanish subject, than from having so understood from himself, and from the fact of his enjoying liberties and privileges which only Spanish subjects were permitted by the laws of the province to enjoy; he was reputed to be a Spanish subject."

Fourth. If you answer the second direct interrogatory in the affirmative, please state how you obtained such knowledge; was it not from report or hearsay, or the statements of said James Darley himself?

To the fourth cross-interrogatory, witness says:—

"My answer to the second direct interrogatory embraces all my knowledge on the subject, and is as full as I can make it."

Fifth. If you answer the third direct interrogatory in the affirmative, please state how you obtained your knowledge of said survey; was it from report or hearsay, or the statements of the said James Darley himself? Did you assist in making a survey for said James Darley, at Dunn's lake? If you did, state when and who was the surveyor, whether you know this of your own knowledge or from hearsay.

To the fifth cross-interrogatory, witness says:—

"I obtained my knowledge of the survey spoken of, by having been present at, and assisting in making, such survey at Dunn's lake as before spoken of. It was in the early part of 1818; it might have been in the early part of 1817; it strikes me that it was in the early part of 1818. Mr. McHardy I know of my own knowledge was the surveyor."

Sixth. If you state who were the chain-carriers, state whether you know this fact; do you know it of your own knowledge, or only from hearsay, or the statements of said James Darley himself?

To the sixth cross-interrogatory, witness says:—

"I know who were the chain-carriers of my own knowledge, having been present at, and assisting in, the survey."

Seventh. If you state where the said surveyor commenced his survey, or testify as to other matters inquired of in the fourth direct interrogatory, please state how you know that fact; were you present at the making of the said survey?

To the seventh cross-interrogatory, witness answers:—

"I was present at the making of said survey, and know where the \*survey commenced from my own knowledge; the other portions of the fourth direct interrogatory are fully answered in the answer to that interrogatory. [\*21

Eighth. How old were you at the time when you say the said survey was made? was said James Darley present at the making thereof? who was present? State the names (and age as near as you can recollect) of all the persons who were present.

To the eighth cross-interrogatory, witness says:—

"I was about the age of twenty-one years when that survey was made; the said James Darley was present at the making of said survey, and also a Mr. Gibson, and a Mr. Alexander of Charleston, and the two chain-carriers, and myself, and Mr. McHardy, made up our party. Messrs. Gibson and Alexander took no part in the survey; Mr. Gibson was about twenty-five years of age; Mr. Alexander must have been full fifty years of age, or upwards; George Bulger must have been about forty years of age, and Peter Survel, the other chain-carrier, must have been about thirty years of age; Mr. McHardy was about forty years of age, and Mr. Darley, from thirty to thirty-five years of age, at that time."

Ninth. If you answer the sixth direct interrogatory in the affirmative, please state what marks you pointed out to the said James Gould, Esq., and how you "judged any of said marks to be the same that were made by the said McHardy."

To the ninth cross-interrogatory, witness answers:—

I pointed out to Mr. James M. Gould the blazes, with one or two chops above; I think two chops; I know them to have been the same marks made by me, on occasion of the survey made by McHardy; I judged them to be the same marks, from having made them myself, and from the fact of no other surveyor at that time using the same marks, besides McHardy; these were the marks always made by McHardy in all his surveys.

Tenth. What were said marks? describe them, and also all the other marks that you there saw, particularly; were there any *letters* amongst them? If there were, state what letters.

To the tenth cross-interrogatory, witness answers:—

"Said marks made on said survey were such as I have just described, a blaze with one or two chops about it; I think two chops; we made no other marks, except these blazes and chops. I saw no surveyor's marks other than these, at that time or since; I never saw any letters at or about that place."

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Eleventh. Is there any other matter or thing within your knowledge, material or pertinent to the issue in this case; if there is, please to answer the same as fully and particularly as though you were now thereto specially interrogated?

To the eleventh cross-interrogatory, witness answers:—

“There is no other matter or thing within my knowledge, material or pertinent to the issue in this cause.”

JAMES PELLICIER.

\*22] \*The claimants also offered the evidence of James M. Gould, who made the survey, which was as follows:—

“The survey made by me, and now before me, is a correct survey, according to the certificate appended thereto. I took with me the maps from the land-office.

“I found the marks of the government surveys, the sections and township lines; I took with me as a guide Mr. James Pellicier; I found trees marked, running nearly the same as the northerly line of the tract leading from the lake out in the woods; they were old marks; Mr. Pellicier pointed out to me a tree with old marks, and stated that within a hundred yards of that tree was the line of the grant, that is, the beginning corner; could not tell whether the marks on that tree were surveyor’s marks or not; Pellicier represented it as a starting-point, or as a tree which he recalled to mind as indicating about where the starting-point was. He did not state to me that it began at a stake; he did not positively point out any tree as the starting-point; he said the tract was south of that tree. I then sought for a line, and found the line spoken of; I did not find the line running from that tree, I found the line I suppose about a hundred yards south from that tree; the marked line of trees continued for half a mile from the lake, until we came to a pond; I found no old marks beyond and westwardly of the pond; my line varies a little from that line; it varies, however, several degrees; that old line was recognized by Mr. Pellicier as the line he had assisted in running; he stated that they were marked with a blaze and two chops, and I found trees marked with a blaze and two chops, which were old marks; I did not look for any other trees marked, after I had found the old line; I saw no other old marked trees; they varied a little from the line I run; it bore a little more northerly than mine; I ran the line I did, because it was the course called for by Geo. J. F. Clarke’s survey; the line varied northerly perhaps ten degrees; I ran as I did, moreover, because the order of court directed me as nearly as possible to conform to Clarke’s survey.”

On the 28th of June, 1844, the court pronounced an opinion and decree, from which the following is an extract.

"It cannot be overlooked, in examining the papers thus far, that the evident intention of the Spanish governor was, that a saw-mill should be erected on the lands thus granted, and that that was the sole and only consideration for the grant; and it is singular that the governor did not, as in all other cases of mill grants, make the building of a mill a condition precedent to the giving of an absolute title; for I believe there is no other case of a mill grant, by the governor of East Florida, where the absolute title was not made to depend upon the building of the mill, unless other considerations entered into the grant; but it seems that for some reasons best \*known to himself, Governor Coppinger departed from the usual form, and dispensed with the usual conditions, inserted in such grants, and gave the land in '*absolute property*' to the petitioner, trusting to his good faith to build the mill, which the governor himself sets forth as the sole consideration of the grant. If, therefore, the governor was willing to take that matter upon trust, and to make the grant absolute, and without condition, as it seems he did do, it is not within the province of this court to say that the grant is void, because the condition was not complied with, or the consideration for which it was made was not in fact rendered. [\*23]

"According to the principles which have heretofore governed this court in the adjudication of these land cases, the proofs seem to be sufficient to warrant a confirmation of the grant, and upon the testimony exhibited I consider the claimants entitled to a decree of confirmation; and after a careful examination of the recent survey, made by James M. Gould, and the testimony connected therewith, I think that the location and boundaries of the tract, as defined in that survey, are according to the calls of the grant; and all things considered, it is, perhaps, as fair and proper a location as can well be made.

"It is manifest that Clarke's survey or location, or that which was pretended to have been made by him (and of which a plat has been given in evidence), could not be found, and I presume for the obvious reason that no survey was in fact ever made by him. The recent survey, therefore, could not follow his old survey, but the courses of the different lines of the tract, adopted by the surveyor recently, are the [same] as Clarke's; and on an inspection of the map of the adjacent country, I think that the location and survey, as made by Gould, not only follows the calls of the grant in all essential

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particulars, but corresponds, so far as it can, with Clarke's pretended survey.

"The grant is therefore confirmed, according to the recent survey of Gould, and a decree will be entered accordingly.

"June 28th, 1844.

J. H. BRONSON, *Judge*."

From this decree the United States appealed.

The cause was argued at the preceding term by *Mr. Mason* (then Attorney-General), for the United States, and by *Mr. Yulee*, for the appellee, and held over to the present term under a *curia*.

*Mr. Mason*, for the United States, made four points.

1. That the petition should have been dismissed, because, from the neglect or delay of the claimant, it was not prosecuted to a final decision within two years.

2. Because there is no proof in the record that the plaintiffs are the devisees of Darley, the original claimant.

\*24] \*3. Because the claimant never complied with the condition on which the concession was made, and the United States is not bound, by the laws of nations, the treaty with Spain, or our own laws, to recognize and confirm such an inchoate claim, without a performance of the condition upon which the grant was made.

4. If this obligation exists, the calls of the grant are so indefinite and uncertain, that a location cannot be made agreeably to such calls.

(All this argument is omitted except that upon the fourth point, as the decision of the court rested entirely upon that.)

IV. But if the United States were bound to recognize and confirm the claim without the performance of the condition, and without any *consideration*, the question recurs, Are the calls of the grant so definite and certain that a location can be made under it agreeably to such calls? If they are not, the claim must be rejected.

The grant or concession is for the six miles square of land which the petitioner had solicited. Darley, in his petition, asked for "six miles square of land at the place called Dunn's lake, upon the St. John's river."

There is *no* such place as Dunn's lake upon the St. John's river. The land claimed was not surveyed before the transfer of the province to the United States.

The survey of G. J. F. Clarke purports to have been made on the 21st of December, 1817; but it does not follow the calls of the concession, and is evidently what is called an

office survey, and not an actual survey; and so the court decided.

The one commenced by McHardy was not completed, and for a reason which throws much suspicion over that transaction; viz. because Darley, the grantee, would not show to McHardy, the surveyor, the order of the governor for making the survey, although he said that he had it. See Pellicier's testimony.

McHardy was a private surveyor, and had no right to survey public lands without a *special order*. And the refusal of Darley to show him such an order leads to the presumption, either that he had none, or that Darley had taken Mr. McHardy to the wrong place. This proceeding, therefore, so far from aiding Gould's late location, makes strongly against it.

Dunn's lake is fifteen miles long and three or four wide. It has, therefore, at least thirty-six miles of border. It is not on the St. John's river, but from seven to ten miles distant from it.

On which side should this land be located, — east, west, north, or south? The concession does not show.

The settled doctrine in respect to these Florida grants is, that grants for lands, embracing a wide extent of country, or within a large area of natural or artificial boundaries, and which lands were not surveyed before the 24th January, 1818, and are without such designations as will give a place of beginning for a survey, are not lands withdrawn from the mass of vacant lands ceded to the United States in the Floridas, and are void as well on that account as for [\*25 being so uncertain that locality cannot be given to them.

This doctrine was held in *Buyck's case*, 15 Pet., 215, which was for a grant of lands "at Musquito," south and north of said place. Also, in *O'Hara's case*, 15 Pet., 275.

And, again, in *Delespine's case*, 15 Pet., 319. And also in *Forbes's case*, 15 Pet., 182, "which was for a grant of land in the district or bank of the river Nassau."

And, again, in the case of the *United States v. Miranda*, 16 Pet., 159, 160, and 161, where all these cases are cited and affirmed.

It is believed, therefore, that this grant is void, for the reasons above stated.

It was not made in such a way as to distinguish it from things of a like kind; nor has the identity of the grant been shown by extraneous evidence. *O'Hara and others v. the United States*, 15 Pet., 283.

*Mr. Yulee*, for the appellees. (All of his argument is also

omitted, except upon the 4th point made by the Attorney-General.)

2. It is next objected by the Attorney-General, that the grant must be rejected for indefiniteness in its location.

It is not half as indefinite as many of the cases of Florida grants confirmed by this court. But the fact that it was located prior to the 24th January, 1818, by Clarke, a public officer, whose province it was to make location of grants, gives it certainty and definiteness of locality, if even the terms of the grant were in themselves indefinite.

The survey adopted by the court below is stated by the court to conform "to the calls of the grant in all essential particulars"; and Gould, the surveyor, states that, as directed by the court, he made the survey "to conform, as nearly as possible, to Clarke's survey."

The testimony of Joseph S. Sanchez, at the time United States marshal of East Florida, and that of Mauricio Sanchez, together with an inspection of the map, will show that there is no difficulty in making the location under the grant. Dunn's lake is a sort of adjunct of the St. John's river, between which lake and the river there lies a strip of land of an average width of about five miles, being in some places six, in others more or less. A location on this strip would be strictly and literally as described in the grant, "at the place called Dunn's lake, on the river St. John's."

The Attorney-General erroneously states Sanchez's testimony, in fixing the lake at from seven to ten miles' distance from the river. One of the Sanchez says it is from six to ten, the other (the best informed) says, "the average width of the strip of land lying between the lake and the river St. John's is about five miles," and the survey of Gould shows that the plat extends from the river on one line to the lake on the opposite.

\*26] \*It is unnecessary to refer to the authorities cited by the Attorney-General. The local court, familiar with the localities, decides that the survey is conformable with the calls of the grant; the surveyor of the county so also declares; the inspection of the map will confirm their judgment; and no person familiar with the topography of the vicinage will doubt for a moment that the grant is capable of ready location.

Mr. Justice CATRON delivered the opinion of the court.

We are called on to ascertain the correctness of an opinion and decree pronounced by the Superior Court of East Florida, by which there was confirmed to certain claimants, through



James Darley, a tract of land containing 23,040 acres. The only question proposed to be examined regards a location of the land by the decree. Darley solicited the governor of East Florida, in 1817, to grant to him in absolute property six miles square of land, "at the place called Dunn's lake, upon the river St. John's"; and the grant was made as solicited. This is the entire description. The river St. John's is one of the principal waters of East Florida, and a principal object in its geography, and may therefore be judicially noticed, as minor objects have been, in our decisions affecting Spanish claims in the same section of country. The river is of considerable length, and runs through several lakes; there is no place on the river, however, known as Dunn's lake. so far as we are informed, by the proofs or otherwise; but there is a considerable lake, well known as "Dunn's lake," lying near the St. John's; it is proved to lie east of the river, nearly parallel with it, and about five miles from the river on an average. The lake is about fifteen miles long, and three or four miles wide. From the description of the land solicited, it is difficult to say whether the petitioner asked to have it laid off on the river or on the lake, but the purpose for which the grant was made decides the ambiguity of expression. The object was the erection of machinery for the sawing of lumber, and the advancement of commerce in the province, from the article of lumber; and therefore the land was solicited to be laid off on the river, for the purpose of establishing machinery, to be propelled by water power. Giving the most favorable intendment to the locality described in the petition and grant, still we can only say, that the grant was for land on the river, opposite to the lake; and by further indulging a favorable construction, so as to limit the territory referred to within narrower bounds, hold that the survey should be made on that side of the river next the lake, and between the lake and the river. This was obviously the view taken of the matter by the experienced judge of the Superior Court, and in which we concur.

The St. John's river in its general course of northeast makes a large bend to the west, opposite to the upper end of the lake, and there passes through Lake St. George, and by its meanders lies \*opposite to each end and one side of Dunn's lake. A copy of the plat filed in the land- [\*27 office, representing the township surveys of that locality, is in the record as evidence, from which these facts appear; and also, that the St. John's lies opposite Dunn's lake, by its various bends, for a distance of some thirty miles. This is the base line, on which the survey might front. Then, again,

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by the Spanish ordinances existing in Florida and governing such surveys, the front on the river could not exceed one-third of the longitudinal extension back; nor does the description of "six miles square" alter the rule prescribed by the general law. *Sibbald's case*, 10 Pet., 313; *United States v. Hanson*, 16 Pet., Id., 201. Governed by these rules, and with this extent of territory before it, the Superior Court was called on to identify the land granted, and render a decree. The difficulty lay in finding a point at which to commence the survey; from the face of the grant this could not be done, and therefore the court sought aid from the following additional circumstances. In December, 1817, Geo. Clarke, the surveyor-general of the province, filed a plat and certificate of survey in his office, purporting to have been made of this grant; but no proof was offered to show that any such survey had ever been made by Clarke on the ground, and the Superior Court expressed its apprehensions that the survey was fictitious, as appears by the opinion found in the record; yet, as it might turn out otherwise on search being made on the ground, and as the survey might reasonably conform to the calls of the concession, should landmarks be found, a search and resurvey was ordered, and one was made and returned to the court by Gould, corresponding as near as might be, in the judgment of the surveyor, to the lines laid down on Clarke's plat, at the upper end of Dunn's lake. But no linemarks were found that had been made by Clarke, and his plat and certificate proved to be merely fictitious; his work not extending beyond what he had done on paper. As no aid could be derived from this source to direct the surveyor, Gould, when in the field, he resorted to another; it was this. In the spring of 1818, Darley had employed McHardy, a private surveyor, to lay off the six miles square of land, with the aid of Darley, and where he was present. They commenced at the head of Dunn's lake, and run and marked a line about a mile, and then disagreed as to the propriety of making the survey as proposed by Darley, for what particular reason does not appear. This was all that was ever done in the field previous to the time Gould went on the ground, in July, 1843. Gould took with him Pellicier, who assisted McHardy in marking the line in 1818, for the distance of the mile above spoken of; and finding the marks at that point, Gould commenced the survey on which the decree is founded, and laid off the grant in a square form of six miles to each side, fronting on Dunn's lake, and extending to St. George's lake, through which the river St. John's passes. The survey has no connection with the St. John's

river, further than that \*at its southwest corner it reaches, to the extent of about one mile, the margin [ \*28 of Lake St. George.

In the first place, we are of opinion, that the fictitious plat and certificate of Clarke can have no influence in fixing the identity of the land granted; nor, secondly, can any consideration be accorded to the line-marks made by McHardy in 1818; and, therefore, we are compelled to resort to the face of the concession for a description that will identify the land granted. And here, some legal principles interpose themselves for our government; the first of which is, that the powers of the United States courts are conferred by acts of Congress, and cannot extend beyond the powers conferred. Previous to the passing of the act of May 26, 1824, conferring the jurisdiction on the courts to adjudge incipient titles, such as the present is, the political power could alone finally pass on them, and Congress uniformly did so. By that act the courts were invested with the jurisdiction that Congress had previously exercised; but to an extent considerably limited. The governing rules of adjudication, as prescribed, are found in the second section of that act; first,—“The courts shall have full power and authority to hear and determine all questions in said cause relative to the title of the claimant. Second, the extent, *locality*, and boundaries of the said claim,” &c. And by the sixth section, on a decree being had, and a copy thereof being served on the surveyor-general of the district, he shall survey the land decreed, for which a patent shall be issued by the President to the claimant. The “*locality, extent, and boundaries*,” the court must find, before it can make an effective decree; and if these cannot be found, no decree can be made for any specific piece or parcel of land. The Superior Court had no power to grant land; nor had it any power to decree an equivalent for land that could not be identified; so this court has at various times held; as in *the cases of Forbes* (15 Pet., 184), of *Buyck* (Id., 223), and in several other cases.<sup>1</sup>

The court, not being enabled, in this instance, to derive any assistance from public acts, beyond the face of the grant, nor authorized to grant an equivalent, has presented to it a territory some thirty miles long, on the margin of the river St. John's, at any one point in which distance the survey might be commenced with equal propriety that it might be at any other point; it follows, that the description, when applied to the facts, is too vague and indefinite for any survey to be

<sup>1</sup> See *United States v. DeRodrigues*, 7 Sawy., 636.

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made, and that, therefore, the claimants can take nothing under the concession; and that it is our duty to order the decree of the Superior Court of East Florida to be reversed, and the petition to be dismissed.

We would remark, in addition, that this concession in its leading features cannot be distinguished from various others that have heretofore been brought before this court for adjudication, where no specific land was granted, or intended to \*29] be granted; but it was left to the petitioner to have a survey made of the land in the district referred to by the concession, by the surveyor-general of the province, in due form, on the ground, and to cause the plat and certificate of such survey to be recorded, by the surveyor-general, by which additional public act the land granted was severed from the king's domain, but remained part of it until the survey was made and recorded. Until this was done, the warrant was a floating warrant of survey, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land on the petitioner; so this court in effect held in the case of *Wiggins* (14 Pet., 351). From the time that such claims first came before this court, they have not been deemed as coming within the cognizance of the courts of Florida, because the 8th article of the treaty of 1819 did not embrace them; it only provided, "That grants of land made by his Catholic Majesty, or by his lawful authorities, should be ratified and confirmed to the persons in possession of them, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." Actual manual possession has never been required to give title, but such identity must be established as to enable the courts to ascertain with reasonable certainty where the land lies; as was held in *Hanson's case* (16 Pet., 196), and others. And this may be shown either from the face of the grant, or by a legal survey made by the surveyor-general in conformity to the grant, during the time he had power to make such surveys.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the claimants can take nothing under the concession in this case; whereupon, it is now here ordered and decreed by this court, that

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the decree of the said Superior Court in this case be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said Superior Court, with directions to dismiss the petition of the claimants.

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THE UNITED STATES, PLAINTIFFS IN ERROR, v. GORDON D. BOYD AND OTHERS, DEFENDANTS.

The act of Congress, passed on the 24th of April, 1820 (3 Stat. at L., 566), which substituted cash payments in lieu of credit sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government.

\*The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties [30 upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was.<sup>1</sup>

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.<sup>2</sup>

An instruction given by the court below, viz., that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government, to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void, — was erroneous.

<sup>1</sup> This case is a leading case upon the effect of official reports to bind sureties on an official bond. In *Watkins v. United States*, 9 Wall, 759, it was held that in a suit on a marshal's bond, the introduction of duly certified transcripts of the adjustment of his accounts, by the accounting officer of the treasury, made a *prima facie* case for the government. But the sureties, however, cannot disprove the receipt of moneys with which he has charged himself after the execution of his bond. *United States v. Girault*, 11 How., 22. Yet, in Nevada, it was held, on a trial against the sureties on the official bond of a State treasurer, to recover for defalcation claimed to have taken place within the period covered by the instrument, that it was competent to show that the defalcation occurred previous to the giving of the bond, and that any testimony tending to support such defence was relevant and pertinent. *State v. Rhoades*, 6 Nev., 352. In Missouri it is held to be only *prima facie* evidence, even though the money was received while the bond was in force.

*Nolly v. Calloway County Court*, 11 Mo., 447; *State v. Smith*, 20 Mo., 226. It would seem that the same is held in Alabama. *Townsend v. Everett*, 4 Ala., 607. In New York the reports are held not to be conclusive. *Bissell v. Sexton*, 66 N. Y., 55; *Williams v. United States*, 1 How., 290; *United States v. Eckford*, Id., 250. But in Illinois a contrary doctrine is held. *Morley v. Town of Metamora*, 78 Ill., 394; *Roper v. Trustees of Sangamon Lodge*, 91 Ill., 518 (as to default before bond given); *Baker v. Preston*, 1 Gilm. (Va.), 235; *Supervisors of Washington Co. v. Dunn*, 27 Gratt. (Va.), 606 (conclusive after a certain notice given under a statute); the entries are evidence for the sureties, but not conclusive. *Mann v. Yazoo City*, 31 Miss., 574. A sheriff's return of the receipt of money has been held conclusive on his sureties. *Bagot v. State*, 33 Ind., 262; *Price v. Clound*, 6 Ala., 248; so a justice of the peace. *Modisett v. Governor*, 2 Blackf. (Ind.), 135.

<sup>2</sup> DISTINGUISHED. *United States v. Girault*, 11 How., 22, 30.

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The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively.<sup>3</sup>

Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the non-production of the original. Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder.<sup>4</sup>

If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs.<sup>5</sup>

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi. It was formerly before the court, and reported in 15 Pet., 187.

The following statement of the case was made out by Mr. Justice Nelson, and prefixed to the opinion of the court.

The plaintiffs brought an action of debt against the defendants in the court below, upon a receiver's bond, in the district of Mississippi, for defalcation in office, and in which the latter obtained the verdict.

The declaration was in the usual form for the penalty, to which several of the defendants, after craving oyer, pleaded performance. The bond bore date the 15th June, 1837, in the penalty of \$200,000, and after reciting that Boyd had been appointed receiver for the term of four years from the 27th December, 1836, the condition was, that he should faithfully execute and discharge the duties of the office.

The plaintiffs in their replication assigned for breach, that

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<sup>3</sup> The general rule is that the bond of an officer has no retroactive effect. *United States v. Spencer*, 2 McLean, 405; *Myers v. United States*, Id., 493. But if money is paid to an officer, and he holds it at the time the bond is given to secure it, his sureties thereon will be liable for it. *Farrar v. United States*, 5 Pet., 373; *United States v. Boyd*, 15 Id., 187. Where the court had power to require additional sureties to be given whenever it saw fit, it was held that such additional sureties were liable for a default occurring after the bond was given, but before they signed it. *Commonwealth v. Adams*, 3 Bush (Ky.), 41. Where a surety was held liable for money received by his principal before the execution of the bond, see *Choate v. Arrington*, 116 Mass., 552. Where A became B's

surety on a new bond, and the old one was then destroyed, A supposing there was no default under it, it was held that A was liable, in equity, on the new bond for the past default. *County of Frontenac v. Breden*, 17 Grant's Ch. (U. C.), 645.

<sup>4</sup> APPLIED. *Watkins v. United States*, 9 Wall., 702. CITED. *Aurora City v. West*, 7 Wall., 92; *Stanton v. Embrey*, 3 Otto, 553.

<sup>5</sup> CITED. *United States v. Thompson*, 8 Otto, 489.

That the United States are not liable for costs, see *United States v. Barker*, 5 Wheat., 395; *The Antelope*, 12 Wheat., 546; *United States v. McLemore*, 4 How., 286, and note.

The principal case is also cited in *Beall v. Territory*, 1 New Mex., 513; *Overland Desp. Co. v. Wedeles*, Id., 531.

after the 27th December, 1836, and while he was receiver, and as such, the said Boyd received divers large sums of the public moneys, amounting to the sum of \$59,622.60, and which he had failed and neglected to pay over to the government.

To this replication the defendants demurred, and therefore the plaintiffs put in an amended replication; and in which a second breach was assigned, alleging that the said Boyd, after 27th December, 1836, and on divers days and times between that day and the 30th day of December, 1837, while he was receiver of the public moneys, and as such, received divers large sums of the public moneys, amounting in the whole to the sum of \$59,622.60; and \*further, that this sum remained in the hands of the said Boyd, as such receiver, [\*31 on the 30th September, 1837, and that he then and there wholly failed and neglected to pay over the same.

To this amended replication the defendants demurred, and assigned for causes,—

1. That the breaches set forth did not state the time when the said Boyd, as such receiver, received the moneys mentioned therein; nor whether the said sum was received before or after the day of the date of the bond.

2. That the said breaches did not state that the said Boyd failed or neglected to pay over the money received by him as such receiver, at any time after the date of the bond.

The plaintiffs joined a demurrer; and the court below gave judgment for the defendants. The cause came up to this court on a writ of error, upon which the judgment was reversed, and the case remanded for further proceedings.

When the cause came back to the court below, Boyd, after craving oyer, pleaded separately performance, and to the replication assigning breaches he rejoined, setting forth a former recovery in assumpsit in bar of the action against him,—to which the plaintiffs answered, *nul tiel record*. This issue being found for the defendant, he was discharged without day.

The other defendants then put in a rejoinder to the amended replication of the plaintiffs, and alleged that the said Boyd did not, as a receiver, receive any public moneys at the time of the execution of said bond, or at any time thereafter, and before the commencement of the suit; and that no public moneys of the United States for the payment of which the defendants were chargeable by virtue of their bond remained in the hands of the said Boyd, as such receiver, at the time of the execution of the bond, or at any time thereafter and before the commencement of the suit, which the said Boyd had failed or neglected to pay over to the government.

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To this rejoinder the plaintiffs demurred, and the defendants joined in the demurrer. The court below gave judgment for the plaintiffs, but allowed the defendants to amend, which was done accordingly; and in the amended rejoinder they aver, that no public moneys of the United States came to the hands of the said Boyd, as such receiver, after the execution of the said bond, nor were there any such public moneys for the payment of which the defendants were chargeable by virtue of the said bond, received by him prior to the execution of the same, remaining in the hands of said receiver in his official capacity at the time of the execution of said bond, or at any time thereafter, which had not been paid or accounted for according to law, before the commencement of the suit, upon which issue was taken.

On the trial the plaintiffs gave in evidence two treasury transcripts, one dated Feb. 27, 1838, adjusting a balance \*32] against Boyd, as \*receiver, of \$59,622.60, due to the government on the 30th Sept., 1837, the other dated Sept. 17, 1838, adjusting a like balance against him of that date.

The plaintiffs also gave in evidence the returns of Boyd, as such receiver, to the treasury department, containing the account current as kept by him with the government, covering a period from Dec. 31, 1836, to Sept. 25, 1837; and which agreed substantially with the balance due, as shown by the treasury transcripts. They were made monthly to the department.

Upon this the plaintiffs rested.

The defendants then proved, that no lands had been entered or sold at the office of the registers, at Columbus, or receiver's certificates issued by the receiver (Boyd), after the 29th of May, 1837. The last tract of land sold was entered on that day. This was proved by the register and confirmed by the records on file in the land-office.

It was further proved, that while the sales of the public lands were going on at Columbus, and in the month of January or February, 1837, Boyd permitted one Pearle to enter lands to the amount of some \$12,000 or \$15,000, without paying any money for the same, taking only his checks upon the Planters' Bank in the vicinity, which were uniformly dishonored as soon as presented for payment.

It further appeared, that Boyd himself, while such receiver, and before the execution of the bond in question, made entries in his own name, and in the name of others for his benefit, of a large quantity of the public lands at the register's office, and gave the usual certificates for that purpose, with-



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out paying for the same, except by simply charging himself in his accounts with the receipt of so much money.

In the course of the trial evidence was given that a person by the name of Garesche appeared at Columbus, in May, 1837, claiming to be an agent from the land-office department authorized to examine the books and accounts of certain land-offices, of which that at Columbus was one; he produced a letter from the department of his appointment, which was recognized as genuine, and thereupon the offices of the register and receiver were examined. The defalcation of Boyd was discovered by the agent, who communicated it to the register, but enjoined secrecy.

The counsel for the plaintiffs objected to the competency of the evidence offered to prove the agency of Garesche, but the objection was overruled, and the decision of the court excepted to.

The defendants then offered Boyd, the receiver, as a witness, and with a view to remove all objections, on the ground of interest, releases were executed from them to him, discharging him from all liability in case a judgment should be rendered against them. They also produced a certificate of the clerk, stating that an amount of money had been deposited in court by Cocke, one of the \*defendants, to [\*38 cover all costs, and also a release by the said Cocke to the other defendants, discharging them from contribution.

The witness was still objected to, but admitted; to which decision the counsel for the plaintiffs excepted.

In the course of the examination of this witness, an objection was taken to his testimony going to prove, that he had no moneys in his hands belonging to the United States at the date of the bond, on the ground, it would be in contradiction of the statements contained in his official returns to the treasury department. The objection was overruled and the testimony admitted; to which decision the counsel excepted.

The witness testified that he had no money in his hands, as receiver, or otherwise, in court for the United States, at the date of the bond; and that he had so informed Garesche, the agent, before the execution of the same; and that after the execution he had paid over all moneys which he had received.

The testimony here closed, and the counsel for the plaintiffs prayed the court to instruct the jury.—

1. That the official returns of the receiver to the treasury department were conclusive against the sureties.

2. That there was no sufficient legal evidence before the jury of the agency of Garesche.

3. That fraud could not be imputed to the United States.

And the counsel for the defendants prayed the court to instruct the jury,—

1. That if the jury found that the balance claimed by the United States from Boyd arose from his returns, as receiver, of entries of public lands, made by him and others, prior to the execution of the bond, and that no money had been paid for the same on such entries before or after the execution of said bond, and that the entries had been made unlawfully without payment, then the sureties were not liable.

2. That the facts stated in the transcripts of the returns made by Boyd, of moneys on hand, were not conclusive against the defendants, but might be explained, contradicted, or disproved by the evidence.

3. That if the jury believed that the balance claimed by the United States arose out of moneys received by Boyd before the execution of the bond, and that the same was not held by him, as receiver, in trust for the government, at or after the execution of the bond, but had been used, wasted, or converted by him to his own use, prior to said execution, then the sureties were not liable.

The court charged the jury, that the evidence, on the part of the plaintiffs, made out a *prima facie* case; but that if they believed, from the whole evidence, that the defalcation of Boyd arose from the entry of lands in his own name and \*34] in the name of others without payment \*of money for the same, and previous to the 15th day of June, 1837, the date of the bond, the sureties were not responsible.

The court further charged the jury, that if they believed, from the evidence, that a fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of Boyd's defalcation from the sureties until they should execute the bond; and that such design was communicated to the Secretary of the Treasury, and his answer received before the actual execution of the bond, that then the bond would be fraudulent and void, and the sureties not liable.

To the instructions as given, and also to the refusal of the court to give the constructions as prayed for, the counsel for plaintiffs excepted. The jury found a verdict for the defendants.

The cause was argued at the preceding term by *Mr. Mason* (then Attorney-General), for the United States, plaintiffs in error, and by *Mr. Cocke* and *Mr. Henderson*, for the defendants in error.

*Mr. Mason* made the following points:—

I. The court erred in admitting testimony objected to, and in rejecting testimony offered by the United States to rebut defendants' evidence.

1. There was no legal proof of Garesche's agency, or of the extent of his powers to bind the United States. If any such agency existed, the instructions were of record in the treasury department, could be made evidence in the mode prescribed by law, and secondary evidence was inadmissible. To this general rule of evidence there are some exceptions; but this is not one, or within the principle of them. *Jacob v. United States*, 1 Brock., 528, a case of exception. Agency is a contract, and what constitutes it is matter of law. 1 *Livermore on Agency*, 25. In this case, the learned judge refused to decide whether there was proof of agency, and yet admitted secondary evidence, which was not admissible to establish it; certainly not without notice to the plaintiffs to produce papers in their possession.

As the acts of an agent bind his principal only when within the scope of his powers, it is indispensable to prove the character and extent of his powers before it can be determined whether a particular act is to have that effect. *United States v. Brig Burdett*, 9 Pet., 682.

2. Boyd was an incompetent witness. He was a sworn officer, and made his returns under the sanction of an oath; he was admitted as a witness to prove that these returns were not true. Public policy strongly forbids this, and the maxim of law, *nemo allegans suam turpitudinem est audiendus*, applies.

The case of *United States v. Leffler*, 11 Pet., 86, does not conflict with this position. In that case, the testimony of the principal obligor was not inconsistent with his official conduct.

\*3. But if Garesche's acts were to be permitted to influence the jury, on the proof of agency submitted in [\*35 establishing a fraudulent combination, then the bond previously executed by Boyd, and the defendants as his sureties, was admissible to rebut the inference that they were fraudulently induced to execute the bond on which this suit was instituted. Fraud is an extrinsic circumstance, which, if it exists, will vitiate the act infected; but all extrinsic circumstances are admissible to rebut such an allegation. 2 Stark. Ev., Tit. *Fraud*, 586; *Estwick v. Caillaud*, 5 T. R., 426.

II. After the decision of this court in the cases of *Linn and the United States*, 15 Pet., 200, *Farrar & Brown v. United States*, 5 Id., 373, and the *United States v. Boyd*, 15 Id., 187, I do not feel at liberty to argue that the official

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accounts of the receiver are conclusive against his securities, or that they are responsible for past defalcations, when the language of the condition is not retrospective.

On the merits, it is respectfully submitted, that, on another assignment of breach of the condition, the sureties may be held liable for so much of Boyd's default as arose from his certificates for lands taken up by himself, for which he did not pay over the money when required to do so. There is no legal disability in the receiver to enter public lands.

In *United States v. Boyd*, 15 Pet., 187, the court held, that "it matters not at what time the moneys had been received, if after the appointment they were held by the officer in trust for the United States, and so continued to be held at and after the date of the bond," the securities are bound. As a necessary counterpart of this proposition, if he was so indebted for lands entered by himself, while in office, and the United States chose to recognise the entry so made, and required payment at and after the date of his bond, his dereliction "*was not complete*" until his refusal to pay, or his failure to receive from himself; and for such dereliction his securities were liable. Issuing a certificate without payment to himself on his own entry is official misconduct, but that is not such a misconduct as to vacate the sale, unless the United States insists that it is no sale.

In this view, if correct, it is important that there should be another trial to enable the government to make a new assignment of breach, so as to present this inquiry.

The verdict for the defendants is general. The court below refused to instruct the jury that fraud could not be imputed to the United States, but gave the third instruction, which it is submitted was wholly erroneous. The jury were charged, if they believed, from the evidence, "that a fraudulent design existed between Boyd and Garesche to conceal the fact of Boyd's defalcation from the sureties, until they should execute the bond, and that such design was communicated to the Secretary of the Treasury, and his \*answer \*36] received before the actual execution of the bond, that in such case the bond would be fraudulent and void, and the sureties not liable."

Fraud to have this effect is either matter of law or matter of fact. The instruction proceeds on the assumption that the fraud in this case was fraud in fact, which was left to the jury. Assuming even that the United States may be responsible for the fraudulent conduct of its agents and officers, this instruction was erroneous.

1. Because the bond, being prospective in its operation,

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was not in law or in fact vitiated, if the prior defalcation was concealed from the sureties, or unknown to them.

2. Because there was no proof before the jury of Garesche's agency, or of the scope of his powers, and the court ought not to have left to the jury to frame their verdict on a state of facts which the evidence did not establish. The court having refused to charge the jury on the question, was in error to *assume*, in this instruction, that the agency existed to the extent of affecting the United States by his fraudulent acts. *Hunter v. United States*, 5 Pet., 173.

3. There is no intimation of what the Secretary's answer was, to have the effect of vitiating the security. All that was required was that Boyd and Garesche conspired to conceal the default; that such design was communicated to the Secretary, and his answer received, no matter what it contained; that fact, with the others, wholly insufficient of themselves, in the opinion of the court avoided the bond. It is not conceived possible that such a state of facts is to deprive the government of its resort against the sureties for the official misconduct of their principal.

By law the receiver is to execute bond, with approved security. The duty of approving cannot be delegated to an agent; and as no agency can exist but to do a lawful act, the ministerial duty of seeing the bond executed, and transmitting it to the treasury department, where it was by law to be approved, could not, in the nature of things, include power to vacate the bond by misconduct of the agent. And hence the importance in this case of showing, by proof, the scope of the supposed agent's powers.

*Mr. Cocke*, for defendants.

(After arguing the point of the demurrer to the rejoinder, came to the treasury transcripts.)

We are here called upon to examine whether these certified balances are evidence sufficient to sustain the action. If we shall find that they are not, then the court cannot legitimately disturb the verdict of the jury for the defendants. To the point of the admissibility of the transcripts of the accounts in gross we cite, that "the act of Congress, in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items both of debits and \*credits as they were acted upon by the accounting [\*37 officers of the department.

*United States v. Jones*, 8 Pet., 375.

The defendant is unquestionably entitled to a detailed

statement of the items which compose his account. *Id.* A certified statement of the balance due and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under the second section of the act of the 3d March, 1797. *United States v. Patterson*, Gilpin, 47.

In looking to the duties and liabilities of receivers of public moneys, for the sale of public lands in any land district of Mississippi, there is, perhaps, no form in which public moneys can come into their hands officially, for the payment of which sureties are chargeable, except it be for moneys received for the sale of public land sold in conformity with the requirements of law. A detailed statement of the items is then indispensibly necessary both to give information of the plaintiffs' demand, and to enable the defendants to defend themselves against any illegal or unjust charge; for example, if the item were for the sale of a certain section of land in a certain township and range, it would be competent for the defendants to show that the land was not in the land district, had never been offered for sale by the proclamation of the President, was some one of the variety of Indian or other reservations, and that the title had in no manner been affected by the supposed sale. But to allow a certified statement of a mere money balance in gross, or certified statements of money quarter-balances, to inculcate the defendants would, of necessity, work judicial oppression and injustice; we therefore repeat that the plaintiffs have not made out such a case as would enable them to recover, and that the verdict of the jury for the defendants cannot in this court be disturbed.

The case having arisen in Mississippi and tried there, if her laws are to have effect on the subject (but it is believed they have not), the same principle there prevails; thus, in an action of *indebitatus assumpsit*, the plaintiff shall file with his declaration an account stating distinctly the several items of his claim against the defendant, and in failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration as to give the defendant full notice of the character thereof. *How. & H.'s Digest of the Laws of Mississippi*, 590, sec. 6.

From any view we have been enabled to take of the subject, whatever may be the nature or manner of the subsequent proceedings, the verdict in this case cannot be disturbed.

The next subject that may engage the attention of the  
\*38] court is an \*authenticated abstract of lands purchased  
by Gordon D. Boyd and others, previous to his being  
appointed receiver.

Also a certified abstract of lands purchased by Boyd in his own name *previous* to his being appointed receiver.

Also a certified abstract of lands *assigned* to Boyd *previous* to his being appointed receiver.

Also a certified abstract of lands purchased by Boyd after he was appointed receiver.

Also a certified abstract of lands purchased by Boyd in company with others after he was appointed receiver.

And also a certified abstract of lands *assigned* to Boyd after he was appointed receiver.

These several lists we have examined with care, and looked for their application to the matters in litigation in this suit with anxiety; and if they have the remotest connection with any matter here, on inquiry we confess we have not been able to discover it.

If, however, the court shall perceive their connection and importance, the judges will not fail to make the proper application and determine the weight to be given them in the evidence; we acknowledge our inability to do so.

The remaining balance of the plaintiffs' testimony is certain certified money accounts of the United States with Gordon D. Boyd, receiver of public moneys. These purport to be the quarterly statements of Boyd, of moneys remaining on hand from quarter to quarter, and stand obnoxious to the objections we have before considered. First, that they are not accompanied with transcripts from the books and proceedings of the treasury, showing the items which constitute the accounts in gross. Second, that the lands sold for which the balance is supposed to be created are not stated; and Third, that the sureties should not thereby be denied all opportunity of defending themselves, even by showing that the lands were not subject to sale, that the title thereto yet remained with the government, or to such person as they might otherwise belong. But we will ask the favor again to call the attention of the court to this subject, when we shall consider the testimony of the said Gordon D. Boyd and other witnesses for the defendants. The plaintiffs here rested their cause. The defendants, in their defence, offered the testimony of the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, Robert E. Harris, and the said Gordon D. Boyd.

To which the plaintiffs objected as incompetent, on the ground that the official returns or reports of Boyd, as receiver, could not be contradicted or explained by parol evidence; and the plaintiffs by their attorney thereupon moved the court to charge the jury that the official returns of Gordon

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D. Boyd, made to the treasury department, under the sanction of his oath of office, were conclusive against his sureties. But the court permitted the testimony of the said \*39] \*witnesses to be given to the jury. Before we examine that testimony, we are called upon to determine whether the matters referred to in these treasury transcripts and abstracts are, in law, conclusive upon the defendants, and fix their liability beyond all controversy, like unto a judicial sentence or other legal estoppel, or whether, allowing them to be free from the objections we have interposed to their admissibility, they are to be taken as mere *prima facie* evidence, and like all *prima facie* or presumptive evidence may be rebutted by other contradictory proofs, or attacked for fraud and imposition.

The act of Congress of the 3d of March, 1797, uses this language,—“shall be admitted as evidence.” Its admissibility only is provided for; but nothing is said as to its effect or the amount of credence to be given to it. It is *ex parte* and in derogation of the fixed rules of evidence, and cannot be extended by implication to prohibit sureties from ascertaining the truth, or freeing themselves from the supposed liability of false reports made to the department.

In the case of the *United States v. Eckford's Executors*, 1 How., 262, 263, the court say,—“The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them, and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. The restatement does not falsify the general account, but arranges the items of debts and credits, so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions or in the form of the transcript may not be material. We think that the transcript or restatement of the account as explained by the depositions was competent evidence to the jury. This statement, as appears from deposition of Tarbutt, is deficient in not giving all the credits to which the collector was entitled, but as it relates to the matter in controversy it is evidence. The jury will determine what effect it shall have; the amount charged to the collector at the commencement of the term is only *prima facie* evidence against the sureties.

“If they can show, by circumstance or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment they are not liable for the sum so misapplied.”



It was, in the case here referred to, contended that the duty of the treasury officers in settling these kind of accounts were in their nature judicial and conclusive, but the court did not sustain such views; on the contrary, regarded them as *prima facie* only, and subject to be rebutted by circumstances or otherwise. But we contend that if they had been regarded in the nature of judicial sentences, being merely certified balances in gross, they were not admissible in evidence, any more than would be the minute of a final judgment of a court unsupported by any writ, pleadings, or proofs. \*The instruction, therefore, of the court to the jury, that the evidence on the part of the plaintiffs [\*40 made out a *prima facie* case, was certainly as strong for them as they had any right to demand. Taking these treasury transcripts then as containing a *prima facie* showing of the defendants' liability, we maintain that a full and complete defence is found for them on the following grounds:—

1st. That all moneys that were in fact received by Boyd, as receiver, had been well and truly paid by him into the treasury before the commencement of this suit.

2d. That the balance claimed by the United States arose from returns made by him of false and illegal entries of public lands in his own name and in the names of others, prior to the execution of the bond, and that on such entries no moneys were in fact paid to said receiver or in his hands before or after the execution of the bond; that such entries were unlawful, were nullities, and passed no title out of the government.

3d. That if any balance of moneys received by Boyd was received by him before the execution of the bond, that none such was held by him in trust for the government at or after the execution of the bond, but had been used, wasted, or converted to his own use prior to the execution of the said bond, and,—

4th. That the fact of Boyd's supposed defalcation existed prior to the date of the bond, and was known to V. M. Garesche, the agent of the government, who was bound in morals and in law to have made the same known to the sureties, but who concealed such knowledge and enjoined official secrecy in fraud of the sureties. That the said bond was obtained from the sureties by fraud and no liability exists against them on the bond.

As to the first point, it will be borne in mind that the bond is prospective both in its terms and legal effect, and that it is dated on the 15th of June, 1837. It will be seen by reference to the testimony of William Dowsing, the register of

the same land-office, that the first entry that purports to have been made before Boyd, as receiver, was on the second day of December, 1836, and that the entries closed on the 29th of May, 1837; both of these periods were before the date of the bond. According then to the opinion of the court made in this case on the former adjudication, the sureties are not liable, unless such public moneys remained on hand at and after the date of the bond.

The testimony of all the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, and Robert E. Harris, conduce to show that Boyd made his deposits of public moneys, as they accrued, in the office of the Planters' Bank, at Columbus, where he ought to have made them. By reference to exhibit A., part of the deposition of William B. Winston, it will be seen that the deposits were so made by him, and on comparing them with the statement of moneys paid by Boyd to the government, it is shown \*41] that he well and truly paid over to the plaintiffs all the public moneys actually received by him, and that at or after the date of the bond no such moneys remained in his hands.

The testimony of these witnesses certainly conduced to show this, and the jury having found the issue for the defendants, the court would not be authorized to disturb the verdict. This is so without regard to the testimony of Boyd, but if the testimony of Boyd be competent it is a full defence to the defendants, and is conclusive of the issue in behalf of the defendants. He testifies that at the date of said bond he had no moneys in his hands, as receiver, and did not otherwise hold any moneys at that time for the United States or in trust for them; that before the execution of said bond he had fully informed V. M. Garesche, the agent of the land-office department, that he had no such moneys in his possession; and being further interrogated, he stated that his default, as receiver, was complete and consummated before the execution of said bond, and that after the execution of said bond he did not receive any such moneys not paid over.

If his testimony be competent, its weight and credibility were alone for the province of the jury; they having believed him, and having found their verdict for the defendants, there is no rule by which this court on error would be authorized to disturb the verdict.

We entertain no doubt of the competency of his testimony. He had been previously prosecuted at the suit of the United States in a distinct and separate proceeding for the identical same cause of action, and the United States had obtained a

judgment against him on the 15th of June, 1838, for the sum of \$53,722.50. These proceedings he relied upon as a bar to the plaintiffs' right to have another judgment against him for the same cause on the bond; *nul tiel record* was relied upon by the plaintiffs, but it was found that there was such record; and as it was not thought regular for the plaintiffs to have two operative judgments against the same person for the same cause at the same time, Boyd was discharged from the second action and had no further connection with it. But he was principal in the bond and the other defendants his sureties only.

Before he was allowed to testify, the defendants, on behalf of whom he did testify, were required to release him, his heirs, executors, and administrators, from all claims against him for any money or other thing which he might be liable to them or either of them by reason of any recovery or judgment that might be had against them or either of them, and also all costs incurred or to be incurred by reason of any suit upon the bond, after the discharge mentioned; by these releases the said Boyd was rendered a competent witness for the sureties, who thus released him, and was correctly permitted to testify. *United States v. Leffler*, 11 Wheat., 86. But whence, it may be asked, arose his supposed defalcation? We answer, by his having issued certificates for land before the date of the bond in his own name and in the name of others without having received \*the purchase money [\*42 therefor. See the testimony of William Dowsing, John Davies, John D. Montgomery, and Robert E. Harris, in the printed record. If this be so, allow us here, secondly, to say that whatever may be the nature of the liability of Boyd or his sureties for malfeasance in office, for and on account of these certificates, this proceeding for money received and on hand at and after the date of the bond cannot be supported. In this respect the jury having found for the defendants, this court would not be authorized to disturb the verdict.

We do not think that the United States can be deprived of any portion of the public domain by such false certificates. The act of Congress of the 24th of April, 1820, changing the mode of the disposition of the public lands from the credit to the cash system, provides that "credit shall not be allowed for the purchase money on the sale of any public lands which shall be sold after the 1st day of July, 1820. Lands remaining unsold at the close of a public sale may be sold at private sale by entry at the land-office at one dollar and twenty-five cents per acre, to be paid at the time of making such entry. No lands which have reverted or which shall

revert to the United States for failure in any manner to make payment, shall be subject to entry at private sale until they shall have been first offered to the highest bidder at public sale; no such lands shall be sold at public sale for a less price than one dollar and twenty-five cents per acre, nor on any other terms than that of cash payment." Statutes of the United States at Large, 66, 67. It would seem that the actual payment of the money forms a condition precedent both in fact and in law to the right of the receiver, register, or other officer of the executive government to part with any portion of the public lands.

If, indeed, it be competent for Gordon B. Boyd thus to appropriate \$59,622.60 worth of the public domain to himself without paying for it, the task would not be difficult, on the same principle, for him thus to appropriate the balance of the land in his land district; and if he could be permitted to do so, all other receivers of public moneys could do the same in their several land districts, and thus the title of the whole public domain could pass out of the government without the payment of a dollar. The principle or practice that shall thus deprive the United States of her public lands cannot be sound or be supported by this court.

If, indeed, it be true that the supposed defalcation of Boyd arose before the date of the bond, and from his having issued certificates for the public lands in his own name and in the name of others without receiving payment of the purchase money therefor,—and it is shown by the testimony of the witnesses and the verdict of the jury that such was the manner of his defalcation,—may we not legitimately protest against the right of the executive government successfully to call on \*43] the judiciary to aid them in violating the \*legislation of Congress in this respect, and find security in the confidence that this court will never sanction such a disposition of any portion of the public domain. But what should be the course of the land-office department on the matter before us? We think it is easy and natural and what their duty enjoins, and about which they will have no difficulty.

By proper proceedings to ascertain what lands have thus been entered, set aside the entries and have the lands disposed of as the act of Congress provides; these entries are nullities, and even if a patent had issued it would not affect the title of the United States. For this we beg leave to refer the court to the case of *Stoddard and others v. Chambers*, 2 How., 318. There, it is said "no title can be valid which has been acquired against law. The patent of the defendant having been for land reserved from appropriation is void."

We may then certainly say that a false certificate made in violation of law and in fraud is void, and does not pass any title to the land out of the United States.

3d. The matters of the third point we think we have sufficiently considered of in what has been said on the first and second.

The fourth point, that V. M. Garesche was the agent of the general land-office to settle with Boyd, as receiver, that he made such settlement prior to the date of the bond, ascertained that the defalcation had thus accrued, and fraudulently enjoined secrecy on the officers and clerks in fraud of the defendants, we think we have sufficiently shown.

The fact is, he was such agent, and we think that the court below was bound to take notice that he was such without any direct proof. But William Dowsing, the register of the land-office, says,—“Some time between the 10th and 20th of May, 1837, V. M. Garesche, Esq., produced to him the letter of his appointment from the general land-office department of the United States, authorizing him to examine certain land offices, of which this was one; and from a knowledge derived from a frequent correspondence with the land-office department, I knew the letter of appointment which he produced to be genuine.”

John Davies says,—“Some time in the spring or summer of 1837, the general government sent an agent, named V. M. Garesche, for the purpose of examining into the condition of the land offices.” Robert E. Harris says, that,—“In the latter part of the spring or the first of the summer of 1837, a settlement took place in the land-office, between Col. Boyd, and a man by the name of Garesche, as agent of the government, in reference to such defalcation. He had no other knowledge of the agency of Garesche, or his authority as such, except that he was recognized and regarded by the register and receiver of the land-office at Columbus as such agent, and who settled with him as such.” This we have thought sufficient.

\*His appointment, whatever may have been its form, was not in the possession or control of the defendants. [\*44 The injunction of official secrecy by Garesche as to Boyd's defalcation, see the testimony of William Dowsing, and that of John Davies. This suppression of the fact of Boyd's defalcation was a gross fraud on the sureties, who after the defalcation became sureties. It is most probable, that had the sureties been informed that Boyd had become a defaulter to the government to that large amount, they would have been sufficiently prudent never to have become responsible for him

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on the bond. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. 2 How., 318. It certainly ought to defeat a false certificate.

The plaintiffs further offered the copy of another and different bond, which was objected to by the defendants; and as it related to another, separate, distinct, and independent matter, the court very properly sustained the objection.

The plaintiffs also objected to some portions of the testimony, on account of the manner in which the several witnesses gave in their testimony, but as the objections were trivial, unbecoming the dignity of the investigation, and as the testimony is in other respects regarded amply sufficient to sustain the verdict, we have not thought it necessary to notice them in detail. When the court charged the jury that the plaintiffs had made out a *prima facie* case, the plaintiffs' attorney substantially obtained all the charges he asked for; the court had already permitted the treasury transcript to be given in evidence to the jury, as being in judgment of law sufficient to establish the plaintiffs' right; the jury of necessity regarded them in that light. But the defendants were allowed to impeach the transcripts for illegality and fraud. It was equally regular to impeach them for any omission or mistakes, and thus they were compelled to yield the influence of the rebutting proofs.

In view of the whole case, we are satisfied it will be seen that the said Boyd had not any money of the United States at or after the execution of the bond, but that the same had all been paid into the treasury.

That his entire defalcation arose from his fraudulently and illegally issuing land certificates in his own name, and in the name of others, without being paid the purchase money, that they ought to be set aside, and the land considered as yet belonging to the government.

That it was a fraud in Garesche to conceal from the sureties the fact of Boyd's defalcation, and that the judgment of the court below ought not to be reversed, but the executive government left to the discharge of its duty in setting aside those illegal entries and certificates.

\*45] *\*Synopsis of the Argument of John Henderson, for Defendants.*

The bill of exception filed in this case is of that form which has heretofore met, and we think deservedly, the reprehension of this court. It comprises, at length, all the testimony

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on both sides, and extends to 161 pages, being all the record, less 17 pages. The various parts of the testimony is chiefly objected to, with a generality of exception, which presents no specific matter of law for the consideration of this court, but devolves it upon this court to sift depositions at length, to ascertain if there be any exceptionable matter to justify the general objections taken.

We should feel ourselves justified, did we think our defence made it necessary, to object that most of this extended volume of testimony is not before this court on any sufficient points of exception, as to entitle it to be reviewed by this court, under the common law rules of proceeding, as a court of error. But, waiving all such objections, we shall meet the plaintiffs' case, regardless of this deficiency.

In aggregating the general objections of the plaintiffs to the five several depositions of the defendants, that they were "incompetent" testimony, and with intimations that plaintiffs' case rested on "conclusive" proof, we can reduce these objections to no other legal position, than that the defendants were estopped from denying the plaintiffs' case by any proof whatever. For surely the defendants' testimony was pertinent to the issue, and it is not objected that the deponents were not competent and disinterested witnesses. Nor can it be doubted but the jury rightly estimated this testimony as disproving the plaintiffs' case. Reduced, then, to a legal elementary principle, the sum total of these objections is, that the defendants were concluded and estopped in law, from showing the truth against the fair-seeming, but fictitious case the plaintiffs had presented.

To this view of the case, our first answer is, that, if this position has any foundation in law, then it was peculiarly a case in which the estoppel should have been pleaded. It was not an estoppel *in pais*, coming up incidentally as evidence. The supposed matters of estoppel were the treasury transcripts presented by the plaintiffs as their ground of action, and if regarded by them as records conclusive on the defendants, they should have pleaded them specially in their replication, and not joined the defendants in an open and general issue, and then object that the defendants should not prove their issue as joined. If, then, it be a case of estoppel, it should have been so pleaded. 6 Munf. (Va.), 120; 2 A. K. Marsh. (Ky.), 148; 8 Dana (Ky.), 103; 2 Johns. (N. Y.), 882; 6 Pick. (Mass.), 864; 14 Mass., 241; 2 Blackf. (Ind.), 465; 2 Pa., 492.

But we say this is not an estoppel, because neither matter

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of deed or of judicial record. 18 Johns. (N. Y.), 490; 3 Wend. (N. Y.), 27.

\*46] \*And is not an estoppel, because there was no mutuality of obligation between the parties to the matter of estoppel. The United States were not concluded by Boyd's returns, neither by the account as stated, nor the fictitious sales of the public lands, thereby reported to have been sold. Estoppel must be mutual. 2 Johns. (N. Y.), 382; 3 Rand. (Va.), 563.

Boyd's returns were no stronger evidence than receipts, which never work an estoppel. 12 Pick. (Mass.), 557.

But, so far from the plaintiffs' proof from the treasury department being "conclusive," a part, if not all of it, was clearly inadmissible as evidence at all.

The account showing settlement and balance struck by the treasury department against Boyd was no sort of legal proof. It resulted from no accounts and charges kept in the treasury department, and included no charge for money advanced or paid out of the department, but was only the result of certain treasury officers, in stating Boyd's account from reported returns, and data furnished by himself.

Now, the rule is settled in the case of *United States v. Buford*, and in other cases, that in a suit for money which came to the hands of a collecting officer *in pais*, and not received from the treasury department, a treasury statement, in such case, is no evidence of the debt. 3 Pet., 29; 6 Id., 202; 5 Id., 292; 8 Id., 375.

The papers certified from p. 17 to 22 of the record, are of this description, and should not have been admitted in evidence at all. Gilpin, 47.

The accounts certified from p. 48 to 55 as "true copies of the originals on file in said department," are perhaps, by another provision of law than that which provides for certified transcripts of accounts from the treasury books, admissible as secondary proof of the facts contained, but not necessarily of a debt due, and certainly as open to correction or disproof as accounts and receipts ever are, and having, in no sense whatever, any judicial verity. See cases cited above.

The plaintiffs' testimony shows, that the alleged balance of account due from Boyd was not of money received after execution of defendants' bond, but is carried forward, as "an amount remaining on hand *per* last return," from the months of February or March preceding.

The facts, then, which we have assumed as our right to prove are, that this reported balance was a mere fiction of figures, without any reality; and that the fiction was made



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to figure as fact, by a device, palpably violative of the laws of the United States, in selling the public domain on credit, and charging up the price as cash received.

We have answered, that it was our province to show, and by our proof we have shown, to the satisfaction of a court and jury, that the balance of money on hand, as reported by Boyd, since the \*execution of defendants' bond, was a fiction. 5 Pet., 373; 8 Id., 399. [\*47

We have shown by our proof, too, that this balance arose from sales made of the public land on credit, and for which no money was received.

Can this court assume, for a moment, this may be lawfully done by the mere unmeaning device of a receiver, charging up his account sales, that the price was received, when in truth it was not.

The law says credit shall not be allowed for the purchase money on sale of the public lands after 1st July, 1821. Land Laws, 324. That lands subject to entry shall be paid for "at the time of making such entry." Land Laws, 324.

Is there any equitable license for the land officer, or this court, to dispense with the positive requirements of this law?

Now, we maintain, the provisions and requirements of this law rest in a superior and pervading public policy, and, as such, its high commands are in no sense directory, but mandatory and peremptory. Laws founded in public policy have no flexible equities authorizing any countenance to be given by the courts to their violation. Nor can it be tolerated, to meet any particular act of the citizen, that their known violation should be judicially covered up by an estoppel. Such are the English shipping acts, and so of ours; and of like high statutory policy is the system of our laws for the sale of public lands. 1 Story Eq., § 177.

In this case, then, the court will declare it to be the duty of the land department of our government to disregard these affected and unreal sales, consider them as void, and resume the title to the government, as unaffected by the acts now attempted to be validated; and such, in effect and principle, has been the previous decisions of this court. No title is valid if acquired against law. . . . A patent issued against law is void. 2 How., 318; 13 Pet., 511.

Lands not subject to sale by law do not pass, without a register's certificate and payment; and the title of the United States is not diverted or affected thereby. 13 Pet., 498.

So, too, 11 Wheat., 384; 9 Cranch, 87.

The objection to Boyd as a witness is not well taken. He was exonerated by the parties for whom he deposed, for both

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debt and costs, and had, therefore, no interests disqualifying him. 11 Pet., 86; 7 Cranch, 206; 7 Wheat., 356.

The objections to the charges and refusal to charge by the court below, we regard as wholly groundless. The court charged the full strength of the plaintiffs' case, and the other points vindicate themselves on reading.

But if this court should possibly find error in the trial, then we fall back upon the first error in the judgment of the court below on the pleadings, and demand the judgment of \*48] this court on the \*plaintiffs' demurrer to defendants' first rejoinder, in which we think there is manifest error in the court's judgment against us.

JOHN HENDERSON,  
*Attorney for Defendants.*

Mr. Justice NELSON, after reading the statement in the commencement of this report, proceeded to deliver the opinion of the court.

When this cause was formerly before the court, involving a question arising out of the pleadings, it was held, that the condition of the bond was prospective, and subjected the sureties to liability only in case of default or official misconduct of the principal occurring after the execution of the instrument; and that if intended to cover past dereliction of duty, it should have been made retrospective in its language; that the sureties had not undertaken for past misconduct. 15 Pet., 187.

The case is now before us, after a trial on the merits, and the question is, whether or not any breach of duty has been established, which entitled the government to recover the amount in question, or any part of it, against the sureties within the condition of the bond as already expounded.

Since the verdict rendered under the instruction given by the court below, we must assume that the whole amount of the \$59,622.60, of which the receiver is in default to the government, accrued against him in consequence of the entry of public lands in his own name, and in the name of others, without the payment of any money in respect to the tracts entered in his own name, and without exacting payment of others, in respect to the tracts entered in their names; and all happening before the 15th June, 1837, the date of the bond. So the jury have found.

The fraud, thus developed, was accomplished at the time by means of false certificates of the receipt of the purchase money by the receiver, which were given by him in the usual way, as the entries for the several tracts of land were made.

at the register's office, and also by entering and keeping the accounts with the government the same as if the money had been actually paid as fast as the lots were entered. The monthly or quarterly returns to the proper department would thus appear unexceptionable, and the fraud concealed until payment of the balances should be called for by the Government.

According to the finding of the jury, therefore, the whole of the money, of which the receiver is claimed to be, and no doubt is, in default, and for which the sureties are and ought to be made responsible, were not only not in his hands or custody at the time of the execution of the bond, but, in point of fact, never had been in his hands at any time before or since. No part of it was ever received by any body. The whole of the account charged was \*made up by means of fabricated certificates of the receiver, and false entries in his returns to the government. [\*49

The act of Congress of the 24th of April, 1820, § 2 (3 Stat. at L., 566), provides,—“That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next; but every purchaser of land sold at public sale thereafter shall, on the day of the purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office.”

The acts of the receiver, out of which the defalcation in question arose, were in direct violation of this provision of law, and constituted a breach of official duty, which made him liable at once as a defaulter to the government, and would have subjected his sureties upon the official bond, if one had been given, covering this period. It was doubtless by some accident that the bond was omitted, as it will be seen by reference to the acts of Congress, 3d March, 1833, § 5 (4 Stat. at L., 653), and 3d of March, 1803, § 4, and 10th of May, 1800, § 6 (2 Stat. at L., 75, 230), that a bond with sufficient sureties should have been given by the receiver, before he entered upon the duties of his office.

It is clear, therefore, that the defalcation had accrued, and Boyd had become a defaulter and debtor to the government, before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective, and to cover past as well as future misconduct, which has already been otherwise determined.

Whether a receiver can purchase the public lands within his district in his own name, or in the name of others for his benefit, while in office, consistent with law and the proper discharge of his official duties, it is not now necessary to express an opinion.

The register is expressly prohibited, act of Congress, 10 May, 1800, § 10 (2 Stat. at L., 77), and it would have been as well if the prohibition had included the receiver.

One thing, however, is clear, and which is sufficient for the purpose of this decision, the act of Congress, forbidding the sale of the public lands on credit, makes no exception in favor of any officers. He must purchase, if he purchases at all, upon the terms prescribed. If this is impracticable, it only proves that the duty of the receiver is inconsistent and incompatible with the duty of the purchaser, which might amount to a virtual prohibition. But, if otherwise, and the receiver allowed to purchase, the money must be paid over, as in the case of other purchasers, and deposited at the time of the purchase with the other moneys received and held by him in trust for the government. The public moneys in his \*50] hands \*constitute a fund, which it is his duty to keep, and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view, that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of Congress.

It has been contended, that the returns of the receiver to the treasury department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties; but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands, in his accounts with the government.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases.

If the case had stood upon the first instruction of the court below, and to which we have already adverted, there

would be no difficulty in affirming the judgment. But the second instruction was erroneous.

The court charged, that if the jury believed, from the evidence, that fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of the former's defalcation from the sureties until they had executed the bond, and that such design was communicated to the Secretary of the Treasury, and his answer received before the execution, in that case the bond would be fraudulent and void, and the sureties not liable.

Now, in the first place, there is no evidence in the case, laying a foundation for the charge of fraud in the execution of the bond, in the view taken by the court as matter of fact, and therefore the construction was improperly given. And, in the second place, if there had been, inasmuch as the condition of the bond is prospective, any fraud in respect to past transactions not within the condition, which is the only fraud pretended, could not, upon any principles, have the effect of rendering the instrument null and void in its prospective operation. We may add, also, that, so far as the agency of Garesche was material in making out the allegation of fraud for the purpose of defeating the action, the proof was altogether incompetent. His acts and declarations for the purpose were admitted without previous evidence of his appointment as agent; and also secondary proof of the contents of a pretended letter of appointment, without first accounting for the non-production of the original.

\*Before a party can be made responsible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter. [\*51

The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiffs' amended replication, overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants.

The answer to this is, that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a waiver of the judgment.

If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand.

Another ground upon which the judgment must be reversed is, that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs.

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Pepper et al. v. Dunlap et al.

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Some other points were made in the course of the trial, but it is unimportant to notice them.

Judgment of the court below reversed, with a *venire de novo*.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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JAMES PEPPER, SARAH H. EVANS, GEORGE McCULLOUGH,  
AND LOUISA McCULLOUGH, PLAINTIFFS IN ERROR, v.  
HUGH W. DUNLAP, CURATOR, &C., AND HIS WIFE.

Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court.<sup>1</sup>

The writ of error must be dismissed, on motion.<sup>2</sup>

THIS case was brought by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the State of Louisiana.

\*52] \*Mr. Crittenden moved to dismiss the writ for want of jurisdiction in this court.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by writ of error to the Supreme Court of the State of Louisiana; and a motion is made to dismiss it for want of jurisdiction in this court.

It is unnecessary to state, at length, the proceedings in the State courts, because it is evident that the decree of the

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<sup>1</sup> FOLLOWED. *Parcels v. Johnson*, 20 Wall., 654. CITED. *Moore v. Robbins*, 18 Wall., 588; *Bostwick v. Brinkerhoff*, 18 Otto, 4.

<sup>2</sup> See note to *McCollum v. Eager*, 2 How., 61.

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Supreme Court of the State was not a final one. And as the case must be dismissed on that ground, the other objections to the jurisdiction of this court which were taken in the argument need not be examined.

It appears from the record, that the defendants in error obtained a decree in the District Court of Louisiana for the Ninth Judicial District, for a perpetual injunction, staying all further proceedings upon an order of seizure and sale of certain lands and other property mentioned in the proceedings, which before that time had been issued by the said District Court upon the petition of the present plaintiffs in error. From this decree an appeal was taken to the Supreme Court of the State; and at the hearing in that court it was decided that the present defendants in error, in whose favor the injunction had been granted, were entitled to relief for a large portion of their claim. The decree specifies sundry items which ought to be deducted from the claim of the plaintiffs in error, amounting to a very large sum; but states that the evidence before the court did not enable it to decide finally upon the rights of the parties, and especially upon the amount which the defendants in error were bound in equity to refund to the plaintiffs. And the court, therefore, decreed that the judgment of the District Court, granting a perpetual injunction, should be avoided and reversed; and remanded the case to the District Court for further proceedings in conformity to the opinion expressed in this decree.

This is the decree brought here by the writ of error. It is evidently not a final one, and the writ of error must therefore be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, holding sessions for the Western District of Louisiana, and was argued by counsel. On consideration whereof, and it appearing to the court here that the judgment of the said Supreme Court is not a final one, it is thereupon now here ordered and adjudged by this court that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

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\*MORGAN MCAFEE, PLAINTIFF IN ERROR, v. THOMAS C. DOREMUS, JAMES SUYDAM, CORNELIUS R. SUYDAM, AND JOHN NIXON. [\*58]

By the laws of Louisiana, a notary is required to record in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers, a certified copy of which record is made evidence.

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Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment; a subsequent protest and notice to the drawers and indorsers respectively, is good evidence.<sup>1</sup>

The original protest must be recorded in a book. Its absence at the trial is therefore sufficiently accounted for.

Where a joint action against the drawers and indorser was commenced under the statute of Mississippi (which statute this court has heretofore, 16 Pet., 89, held to be repugnant to an act of Congress), the plaintiffs may discontinue the suit against the drawers and proceed against the indorser only.<sup>2</sup>

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

On the 8th of December, 1839, the following bill of exchange was drawn.

\$4,000.

*Locopolis, Miss., Dec. 8th, 1839.*

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your obd't servants.

CLYMER, POLK, & Co.

Messrs. KEYS & ROBERTS, *New Orleans.*

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<sup>1</sup> "A notary, *registrarius, actarius, scrivenarius*, was anciently a scribe that only took notes or minutes, and made short drafts of writings and other instruments, both public and private. He is at this day a public officer of the civil and common law, appointed by the Archbishop of Canterbury, who, in the instrument of appointment, decrees 'that full faith be given, as well in as out of judgment to the instruments by him to be made.' [Ayliffe's Parergon, 385; Burns' Eccl. Law, 1.] This appointment is also registered and subscribed by the clerk of her majesty for faculties in Chancery." Byles on Bills, 262 (7 Am. ed.). Certified copies of the acts of notaries prove themselves, and are admissible in all courts as *prima facie* evidence of the facts therein stated. *Anon.*, 12 Mod., 345; *Halliday v. McDougal*, 20 Wend. (N. Y.), 81; *Townsley v. Sumrall*, 2 Pet., 170; *Nicholls v. Webb*, 8 Wheat., p. 333; *Dewolf v. Murray*, 2 Sandf. (N. Y.), 166; *Townsend v. Lorain Bank*, 2 Ohio St., 345; *Chase v. Taylor*, 4 Har. & J. (Md.), 54. But

such copy is not evidence of notice unless provided by statute. *Harrison v. Robinson*, 4 How., 336; *Walker v. Turner*, 2 Gratt. (Va.), p. 536; *Lloyd v. McGair*, 3 Pa. St., 482; *Miller v. Hackley*, 5 Johns. (N. Y.), 384; *Dickens v. Beal*, 10 Pet., 582; *Bank of Rochester v. Gray*, 2 Hill (N. Y.), 231; *Williams v. Putnam*, 14 N. H., 540; *Swayze v. Britten*, 17 Kan., 625; *Couch v. Sherrill*, Id., 624; *Rives v. Parmley*, 18 Ala., 256.

But the protest is only *prima facie* evidence of the facts stated therein. *Nelson v. Fotherall*, 7 Leigh (Va.), 180; *Union Bank v. Fowlker*, 2 Sneed (Tenn.), 555; *Spence v. Crockett*, 5 Baxt. (Tenn.), 576; *Howard Bank v. Carson*, 50 Md., 27; *Rickett v. Pendleton*, 14 Md., 320; and although the notary, when examined, has no recollection of the facts stated therein, it is still *prima facie* evidence until contradicted. *Sherer v. Easton Bank*, 33 Pa. St., 134.

<sup>2</sup> FOLLOWED. *Coffee v. Planters' Bank of Tennessee*, 13 How., 189.



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The firm of Clymer, Polk, & Co., consisted of Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer.

McAfee indorsed it, and it came to the hands of the defendants in error, merchants and partners in New York, trading under the firm of Doremus, Suydams, and Nixon.

When the bill became due it was not paid, and was protested under the circumstances set forth in the first bill of exception.

In May, 1842, Doremus, Suydams, and Nixon brought a suit against the four makers and also against McAfee, the indorser. The action was a joint one, as required by a statute of Mississippi, passed on the 13th of May, 1837, which was as follows.

"Section 1. Be it enacted by the legislature of the State of Mississippi, that in all actions founded upon bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and indorsers living and resident in this State in a joint action; and such suit shall be commenced in the county where the drawer or drawers reside, if living in the State; and if the drawer or drawers be dead, or reside out of the State, the suit shall be brought in the county where the first indorser resides.

"Sec. 2. Be it further enacted, that in all cases where any drawer, acceptor, or indorser shall have died before the commencement of the suit, a separate action may be brought against the representatives of such drawers, [\*54 indorsers, and acceptors.

"Sec. 3. Be it further enacted, that the court shall receive the plea of non-assumpsit and no other, as a defence to the merits, in all suits brought in pursuance of this act; and all matters of defence may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict againsts part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall enter up the proper judgment in such verdicts against the defendants; which judgments and verdicts shall not be reversed, annulled, or set aside for want of form.

"Sec. 4. Be it further enacted, that new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against; and judgments shall be entered against all the other defendants in pursuance of the verdict.

"Sec. 5. Be it further enacted, that the clerk shall issue duplicate writs to the several counties where the various defendants may reside, and shall indorse on all executions the names of the drawers and indorsers, particularly specifying the first, second, and third indorsers.

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"Sec. 6. Be it further enacted, that it shall be the duty of the sheriff, in all cases, to make the money on the executions, out of the drawer or drawers, acceptor or acceptors; and in no case shall a levy be made on the property of any security or securities, indorser or indorsers, unless an affidavit from some credible person be made and filed among the papers in the case, setting forth that the principal or principals have no property in this State, out of which the plaintiff's money and costs can be made; and in such event the plaintiff may proceed with the executions against the defendants next liable, and so on until his executions be satisfied.

"Sec. 7. Be it further enacted, that no sheriff, or other officer, shall take more than one forthcoming bond, in any case, for the same cause of action.

"Sec. 8. Be it further enacted, that any plaintiff shall have the right to discontinue his suit against any one or more of the indorsers or securities, that he may sue in any joint action, before verdict, on payment of the costs that may have accrued by joining said defendant in such suit.

"Sec. 9. Be it further enacted, that in all suits brought under the provisions of this act, the defendants shall not be allowed to sever in their pleas to the merits of the action, and no plea of abatement shall be allowed to be filed in any cause, unless affidavit be made of the truths of the facts pleaded in the plea of abatement.

"Sec. 10. Be it further enacted, that if any plaintiff or plaintiffs shall cause to be levied an execution on any security, or their indorsers or their property, when the principal has sufficient property in this State to satisfy such execution, the party so offending shall \*be deemed a trespasser, and shall be liable to an action from the party aggrieved, and exemplary damages shall, in all such cases, be awarded by the jury trying the same. Approved, May 13, 1837."

This Statute was, in part, adopted by a rule of court in 1839, as follows:—

"Rule XXX. The practice and proceedings in action at law, by the laws of this State, and the rules of practice for the government of the courts of law, made by the late Supreme Court, where not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this court, or with the existing rules of this court, shall be considered the rules and practice of this court: provided, however, and it is hereby expressly understood, that this rule does not adopt the whole of the act entitled 'An act to

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amend the laws respecting suits to be brought against indorsers of promissory notes,' approved May 13th, 1837; but that all of said act, except the tenth section thereof, is, and it is intended to be, adopted."

At June term, 1842, McAfee pleaded the general issue.

In June, 1843, three of the four drawers of the bill having been served with process and the remaining one not, the suit was discontinued as to the drawers, and continued against McAfee alone.

In December, 1843, the cause came on for trial, when a verdict was found for the plaintiffs. During the trial, however, the two following bills of exception were taken.

*First Exception.*

Be it remembered, that on the trial of this cause, on this 8th day of June, 1844, the plaintiffs in this case offered in evidence a bill of exchange in these words:—

\$4,000

*Locopolis, Miss., Dec. 8th, 1839.*

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your ob't servants.

CLYMER, POLK, & Co.

Messrs. KEYS & ROBERTS, *New Orleans.*

Having indorsed thereon the following names, three of which were erased:—

"Pay to Doremus, Suydams & Nixon, or order. Morgan McAfee, Charleston P. O., Miss."

"A. H. Davidson, Charleston P. O., Miss.; G. Davidson, Charleston P. O., Miss.; M. L. Cooper & Co."

The plaintiff then proved that the names of A. H. Davidson and G. Davidson had been erased before the maturity of the bill. The plaintiff then offered in evidence the copy of the original \*protest, accompanied by the deposition [\*56 of the notary public, in these words:—

United States of America, Eastern District of Louisiana,  
City of New Orleans, ss:—

Be it remembered, that on this thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-four, before me, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States in and for the Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled,

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"An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed Feb. 20, 1842, and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts in the United States,'" passed March 1, 1817, and the act, entitled "An act to establish the judicial courts of the United States," passed Sept. 24, 1789, personally appeared H. B. Cenas, a person of sound mind and lawful age, a witness for the plaintiff in civil suit now depending in the District Court of the United States, in and for the Northern District of Mississippi, wherein Doremus, Suydams, and Nixon are plaintiffs, and Clymer, Polk, & Co. (drawers), and Morgan McAfee (indorser) are defendants; and the said H. B. Cenas being by me first carefully examined, and cautioned, and sworn to testify the whole truth and nothing but the truth, did depose and say, that he is a notary public, duly commissioned and sworn, in and for the city and parish of New Orleans, State of Louisiana; that he held said office on the tenth day of March, A. D. 1840, on which day, at the request of the Commercial Bank of New Orleans, holder of the original draft, of which the following is a copy, to wit:—

\$4,000.

*Locopolis, Miss., December 8th, 1839.*

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your obedient servants.

CLYMER, POLK, &amp; Co.

Messrs. KEYS AND ROBERTS, *New Orleans.*

Indorsed:— MORGAN MCAFEE, *Charleston P. O.*  
Messrs. M. D. COOPER & Co.

He, the said notary, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in) and demanded payment thereof, and was answered that the same could not be paid; whereupon he, the said notary, did publicly and solemnly protest said draft for non-payment, and of protest did give notice to Clymer, Polk, & Co., drawers, and to Morgan McAfee, indorser, and M. D. Cooper & Co., indorsers, \*57] by letters to the \*drawer and first indorser severally written and addressed, informing them of said protest, and that the holders looked to them for payment; which letters he, the said notary, did direct to the said drawers and said first indorsers, respectively, as follows:— the one for Clymer, Polk, & Co., drawers, to them at Locopolis, Mississippi, and

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that for the said Morgan McAfee, the first indorser, to him at Charleston P. O., Mississippi, and by delivering that for the last indorsers to themselves. Which letters he, the said notary, did put into the post office at New Orleans aforesaid, on the day and date of said protest. All of which was done under the hand of said notary, and recorded in presence of competent witnesses and in due form of law.

The notary's fees for said protest and notices amounted to \$3.50.

The document A., M. M. Cohen, United States commissioner, is sworn to by me,

H. B. CENAS, *Notary Public*.

United States of America, North Circuit and Eastern District of Louisiana, City of New Orleans, ss:—

I, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States for the Ninth Circuit and Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness lives in New Orleans, State of Louisiana, more than one hundred miles from Pontotoc, State of Mississippi, the place of trial of the cause for and in which said deposition is taken and is necessary. I further certify, that no notification was made out and served on the defendants, or adverse parties, their agent or attorney, to be present at the taking of the deposition, and to put interrogatories if he or they may think fit, and that no notification of the time and place of taking the said deposition was made out and served on said defendants or adverse parties, because neither the said adverse parties, nor any attorney or agent of said adverse parties was, at the time of taking said deposition, within (100) one hundred miles of the said city of New Orleans, the place of taking the said deposition. I further certify, that, on this thirteenth day of May, A. D. 1844, I was by the witness, who is of sound mind and lawful age, and the wit-

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\*58] ness was by \*me carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness; and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up, directing, and forwarding the same with my own hands to the court for which the same was taken.

I further certify, that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, the words "are plaintiffs" being first interlined on page 1, *ante*.

M. M. COHEN, [L. S.]

*U. S. Commissioner Circuit and District Court United States for the Ninth Circuit and Eastern District of Louisiana.*

Commissioner's fee,	\$10 00	} Paid by plaintiffs.
Notary for copy annexed,	2 59	

M. M. COHEN, *U. S. C.*

United States of America, State of Louisiana:—

By this public instrument of protest be it known that, on this tenth day of March, in the year one thousand eight hundred and forty, at the request of the Commercial Bank of New Orleans, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in), and demanded payment thereof, and was answered that the same could not be paid. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, reëxchange, costs, charges, and interests, suffered or to be suffered, for want of payment of the said draft. Thus done and protested in the presence of Law. Dornan and Ernest Granet, witnesses.

In testimony whereof, I grant these presents under my

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signature, and the impress of my seal of office, at the city  
[L. s.] of New Orleans, on the day and year first above  
written.

H. B. CENAS, *Notary Public*.

Original signed,—LAW. DORNAN,  
E. GRANET.

\$4,000.

*Locopolis, Miss., Dec. 8th, 1839.*

Ninety days after date, of this my first of exchange (second  
of same tenor and date unpaid), pay to the order of Morgan  
McAfee \*four thousand dollars, value received, and [59  
charge the same to account [of] your obedient ser-  
vants.

CLYMER, POLK, & Co.

Messrs. KEYS & ROBERTS, *New Orleans*.

Indorsed,—Morgan McAfee, Charleston P. O., Miss., M.  
D. Cooper & Co.

I, the undersigned notary, do hereby certify that the par-  
ties to the draft, whereof a true copy is embodied in the  
accompanying act of protest, have been duly notified of the  
protest thereof by letters to them by me written and addressed,  
dated on the day of said protest, and served on them respec-  
tively this day, in the manner following, viz. by depositing  
those for the drawers and first indorsers in the post office in  
this city on the same day as this protest, directed to them  
respectively as follows:—that for the drawers, to them at  
Locopolis, Miss.; and that for the first indorser, to him at  
Charleston P. O., Miss.; and by delivering that for the last  
indorsers to themselves.

In faith whereof, I hereunto sign my name, together with  
Law. Dornan, and Ernest Granet, witnesses, at New Orleans,  
this 11th day of March, 1840.

Original signed,—Law. Dornan, E. Granet.

H. B. CENAS, *Not. Pub.*

I certify the foregoing to be a true copy of the original  
protest, draft, and memorandum of the manner in which the  
notices were served on file and of record in my office.

In faith whereof I grant these presents, under my signa-  
ture, and the impress of my seal of office, at New Orleans,  
[L. s.] on this ninth day of November, in the year of our  
Lord one thousand eight hundred and forty-three.

H. B. CENAS, *Not. Pub.*

Sworn to before me.

M. M. COHEN, *U. S. C.*

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To the introduction of which copy the defendant by counsel objected, but such objection was overruled by the court, and said copy allowed to be read; to which opinion of the court the defendant excepted, and this his bill of exceptions, before the jury retired from the box, was signed and sealed by the court, and ordered to be made a part of the record.

S. J. GHOLSON. [SEAL.]

*Second Exception.*

The second bill of exceptions referred to the statute and rule abovementioned, and to the discontinuance of the suit against the drawers of the bill, after three of them had been served with process. A motion was made in arrest of judgment, which was overruled by the court, to which overruling the second exception was taken.

\*60]       \*The cause was argued by *Mr. Chalmers* and *Mr. Coze*, for the plaintiff in error, and by *Mr. Stanton* and *Mr. Z. Collins Lee*, for the defendants in error.

*Mr. Chalmers* and *Mr. Coze* contended that the paper admitted in evidence by the court below, purporting to be a copy of the protest of the bill of exchange sued upon, was not duly proved to have been a copy of the protest of the bill of exchange, but a copy of an entry in the notary's book, and that it was not duly proved, even as a copy of the entry in the book.

Secondly, if proved as a copy, it was not admissible as evidence, without laying ground for it by showing the loss of the original, which was not done.

A protest is, properly speaking, a solemn declaration on behalf of the holder against any loss to be sustained by non-acceptance or non-payment (Story, Bills, § 276, p. 301), must be in writing, signed, and sealed by the notary (Chit., Bills, 490, 642), and annexed to the bill itself, if it can be obtained or otherwise a copy (Chit., Bills, 362), with all the indorsements transcribed *verbatim*, with the reasons given by the party why he does not honor the bill; and this is so indispensably necessary, by the custom of merchants, that it cannot be supplied by witnesses or oath of the party, or in any other way, and, as is said, is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer, recognized in all parts of Europe, that a due presentment and dishonor has taken place, and all countries give credit to his certificate of the facts. Chit., Bills, 490. It must be made according to the laws



of the place where the payment ought to have been made. Story, Bills, p. 105, § 278; Chit., Bills, 490. By the laws of Louisiana, where this bill was payable, it is enacted, page 41, Ball. & C. Dig., Laws of Louisiana, that

"The notaries shall keep a separate book in which they shall *transcribe* and *record*, by order of date, all the protests by them made, minutes of notices, &c., &c., made by them, which declaration, duly recorded under signature of such notary and two witnesses," &c.

This book, from which the copy admitted was obtained, is a new *transcription* of the original protest,—a copy, wholly inadmissible itself, without accounting for the non-production of the original, and yet the court admitted a copy of this copy, without showing the loss, destruction, or that the original was not within the control of the party offering the copy. See *Sebree v. Dorr*, 9 Wheat., 558; *Brooks v. Marbury*, 11 Id., 78.

Secondly, the court below erred in overruling plaintiff in error's motion to arrest the judgment. This suit in the court below was \*commenced jointly against the drawers and indorsers of the bill of exchange sued upon under and [\*61 by virtue of the provisions of an act of the Legislature of the State of Mississippi, and a long count of the declaration is framed upon that act, which provides, that "in all actions founded upon bills of exchange and promissory notes the plaintiff shall be compelled to sue the drawers and indorsers living and resident within the State in a joint action." Act of May 13, 1837, Laws of Mississippi, 717; and by a rule of the District Court of the United States for the State of Mississippi, this act was adopted (see Rule XXX.), and, so far as it is not inconsistent with the laws of Congress and the rules of practice prescribed by the Supreme Court of the United States, became by that rule the law of the court. This being the case unless the act of the legislature of Mississippi, in its application to this case, was incompatible with the laws of Congress, or the rules prescribed by the Supreme Court of the United States, or the existing rules of the District Court for Mississippi, the dismissal entered as to defendants below, Isaac Clymer, William C. Ivins, and Benjamin C. Polk, the makers, and taking judgment against McAfee, the plaintiff in error and indorser of the bill sued upon, was manifest error, for which the judgment should have been arrested. See *Wilkinson and Turney v. Tiffany, Duvall, & Co.*, 5 How. (Miss.), 411. Was the act of Mississippi, adopted by the District Court in its application to this case, a violation of the judiciary act of 1789, ch. 20? The eleventh sec-

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tion of that act gives jurisdiction to the Circuit Courts of suits between a citizen of the State where the suit is brought and a citizen of another State, and excepts "any suit to recover the contents of any promissory note, or other chosen action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the contents, if no assignment had been made except in cases of foreign bills of exchange." The foundation of this action was a foreign bill of exchange, and although the drawers and indorser all resided in the State of Mississippi, it came within the exception of the act of Congress, and the District Court neither enlarged or diminished the jurisdiction of the court by adopting the rule, nor is the rule in its application to this case incompatible with the laws of Congress, the rules of practice prescribed by the Supreme Court of the United States, or the existing rules of the District Court. The case of *Keary et al. v. The Farmers and Merchants' Bank of Memphis*, 16 Pet., 89, was founded upon a promissory note, the makers and indorser all living in Mississippi, and the attempt, under this rule, to join them in the same action was pronounced by this court a violation of the judiciary act, in giving a jurisdiction to the District Court which that act had not conferred, and that, therefore, in that case the rule was void. Not so however in this case,—the foundation of this suit being a \*62] foreign bill of exchange, the \*application of the rule violates no law of Congress, nor is it incompatible with any rule prescribed by this court.

The rule established by the District Court, adopting the statute of Mississippi, is of great value to the citizens of that State; and, so far as it can be made applicable to the just jurisdiction of the District Court of the United States in that State, sound public policy, respect for her public functionaries, and the rights and interests of the parties litigant in the federal tribunals of the State, appeal strongly to this court to have the act fairly and fully executed.

*Mr. Lee* and *Mr. Stanton* contended that the proof offered was sufficient; that the object of a protest was accomplished in giving the indorser notice; that certified copies of a protest were generally admissible; that a notary cannot serve the original protest upon each one of the indorsers; that the absence of the original at the trial was sufficiently accounted for by its being on file in the notary's office, and cited *Story*, Bills, 301, 304; 20 Wend. (N. Y.), 82; 8 Wheat., 333; 4 T. R., 175; 2 Pet., 179.

As to the second exception, they contended that the plain-

tiffs living in New York had a right to sue the indorser and drawers, which right could not be taken away; that they had a right to discontinue the action as they did; that the plaintiff in error was estopped from making this objection; that this court has rejected the statute of Mississippi, and cited 1 Pet., 78; 11 Id., 83-85; 16 Id., 94; 2 How., 343.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before this court by a writ of error to the District Court of the Northern District of Mississippi.

The suit was commenced on a bill of exchange against Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polk, & Co., makers, and Morgan McAfee, indorser. The process was served on Polk and McAfee. The latter pleaded the general issue, and an *alias* summons was issued against the defendants not served. This writ was served on Isaac Clymer and William C. Ivins; and at the succeeding June term the plaintiffs, by leave of the court, discontinued the suit against Clymer, Polk, & Co., leaving McAfee, the indorser, the only defendant.

On the trial the plaintiffs offered the deposition of H. B. Cenas, a notary public at New Orleans, to prove a copy of the protest, which was objected to by the defendant; but the court admitted the evidence, and this constitutes the first exception.

By the Louisiana acts of 1821 and 1827, the notary is required to record, in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers; a certified copy of which record is made evidence.

\*Under these statutes it is held, in Louisiana, that [63  
“a certified copy of a protest is sufficient without producing the original.” *Whittemore v. Leake*, 14 La., 394.

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence. *Tornaley v. Sumrall*, 2 Pet., 179. But the rule is different, under the principles of the common law, in regard to inland bills.

The protest offered is certified, under the seal of the notary, “to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in his office.” But the deposition of Cenas, the notary, was relied on as proving the protest and notice. The exception taken was not to the deposition, but to the copy of the protest.

It is insisted that the deposition does not identify the pro-

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test, and if it does, that it is not competent to prove the copy without accounting for the non-production of the original.

In regard to the latter objection, it appears from the statutes above cited, that the notary records the protest and the manner in which notice was given, and this record is, in fact, the original. It is presumed that nothing more than a short memorandum of the demand and notice is taken, from which the record is made in due form; so that there is, strictly, no original except that which is of record. And a copy of this is made evidence by the statute. Now this sufficiently accounts for the non-production of the original; and a sworn or a certified copy is the only evidence of the protest which can be produced.

And we think that the copy of the protest was properly considered as a part of the deposition. It was offered in connection with it, and is referred to as "Document A.," as no other meaning can be given to that reference. The commissioner who took the deposition states, the copy was sworn to before him, and the exception was to the "copy" and not that it was no part of the deposition. And the original being a matter of record, and of course not within the power of the plaintiffs in the Circuit Court, a sworn copy was admissible as evidence.

After the verdict was rendered against McAfee, the indorser, a motion was made in arrest of judgment on the ground that it appeared from the return of the marshal, the process had been duly served on three of the partners of the firm of Clymer, Polk, & Co., who were the drawers of the bill, and that the suit had been discontinued as to them; which motion the court overruled, and to which the defendant excepted.

It appears that the district judge, by a rule of court, adopted nine of the first sections of the statute of Mississippi, entitled "An act to amend the laws respecting suits to be brought against indorsers of promissory notes," &c., approved 13th \*64] May 1837, which \*required suit to be brought against the drawers and indorsers of a bill of exchange jointly. Under this statute the suit was brought against the drawers and also the indorser of the bill.

This statute as adopted by the district judge, was brought before this court in the case of *Keary and others v. The Farmers and Merchants' Bank of Memphis*, 16 Pet., 89, in which the court held that "the law of Mississippi is repugnant to the provisions of the act of Congress, giving jurisdiction to the courts of the United States."

We see no objection, in principle or in practice, to the dis-

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continuance of the suit against the drawers of the bill. Their liability was distinct from that of the indorser. In no respect could the indorser be prejudiced by the discontinuance. As a matter of course it was permitted at the cost of the plaintiffs.

In the case of *Minor et al. v. The Mechanics' Bank of Alexandria*, 1 Pet., 46, the court held, that when the defendants sever in the pleadings, a *nolle prosequi* ought to be allowed against one defendant," that "it is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form not absolutely subjected to authority may well yield to the substantial purposes of practice."

The judgment of the Circuit Court is affirmed, with costs.

#### ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

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ELIZABETH WALKER, DEVISEE OF ROBERT WALKER, DECEASED, PLAINTIFF IN ERROR, v. FRANCIS T. TAYLOR, WILLIAM ROBINSON, WILLIAM E. SABLETT, THOMAS COOK, AND JOHN M. CRESUP, TRUSTEES OF THE TOWN OF COLUMBUS, DEFENDANTS.

Where the plaintiff below claimed a ferry right under an act of the legislature of Kentucky, and the ground of defence was that the act was unconstitutional and void as impairing vested rights, and the decision of the highest State court was against the plaintiff, a writ of error, issued under the 25th section of the judiciary act, will not lie.

This court can entertain jurisdiction under that section only when the decision of the State court is in favor of the validity of such a statute. Here, the decision was against its validity.<sup>1</sup>

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<sup>1</sup> See *Scott v. Jones*, post, \*375.

When the State court decides that the statute of the State, drawn in question, is not valid, no appeal lies to the Supreme Court of the United States. *Winn v. Jackson*, 12 Wheat., 135; *Smith v. Hunter*, 7 How., 738; *Withers v. Buckley*, 20 How., 84.

If the decision is in favor of the

statute, but that decision necessarily draws in question a treaty that is claimed to conflict with it, an appeal lies. *Worcester v. Georgia*, 6 Pet., 515.

The jurisdiction to review does not extend to those laws passed by territorial legislatures. *Miner's Bank v. Iowa*, 12 How., 1.

But if the decision is in favor of the

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\*65] THIS case was brought up, by a writ of error issued under the \*25th section of the judiciary act, from the Court of Appeals for the State of Kentucky.

The case was this.

In 1820, the legislature of Kentucky passed an act, entitled "An act for establishing and laying off a town at the Iron Banks." 2 Moreh. & B. Dig., 1044. It recited that the general assembly of Virginia, in 1783, had authorized the deputation of officers of the Virginia line to lay off four thousand acres of land in such manner and form as they might judge most beneficial for a town, on the Mississippi or the waters thereof, and vest the same in trustees for the common benefit and interest of the whole; that trustees were appointed, who located the four thousand acres of land upon the Mississippi, including the Iron Banks, and that said trustees, or a majority of them, had died before executing the trust reposed in them.

The statute then appointed trustees, who were to cause a survey to be executed for the four thousand acres of land and have the same duly recorded in the office of the surveyor of the lands set apart for the military bounty on State establishment, but declared that the trustees should not (unless thereafter authorized by law) sell or dispose of the same or any part thereof in any manner whatever, but hold the same subject to the control and future disposition by the legislature. It then proceeded to authorize them to lay off a town, divide it into lots, cause a survey to be made, adopt rules for the government of the town, and then authorized them to sell at public sale any number of lots, not exceeding one hundred lots, of half an acre each. All the money arising from such sale was to be paid into the public treasury of the State.

In 1821, an act was passed to amend and repeal, in part, the above act (2 Moreh. & B., 1046). This authorized the

statute, an appeal lies. *Craig v. Missouri*, 4 Pet., 410; *Byrne v. Missouri*, 8 Id., 40; *Crowell v. Randell*, 10 Id., 368; *McKinney v. Carroll*, 12 Id., 86; *Commonwealth Bank of Kentucky v. Griffith*, 14 Id., 50; *Curran v. Arkansas*, 15 How., 304; *Porter v. Foley*, 24 Id., 415; *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116; *The Binghampton Bridge*, 3 Id., 51.

If the case was decided upon a point not necessarily questioning the validity of the statute, no appeal lies. *Mills v. Brown*, 16 Pet., 525.

The State statute must be passed by a State which is a member of the Union, and a public body owing obedience and conformity to its constitution and laws. *Scott v. Jones*, post,\* 343.

It must affirmatively appear from the record that the validity of the statute was actually drawn in question. *Crawford v. Branch Bank*, 7 How., 279; *Matheson v. Branch Bank*, Id., 260; *Grand Gulf R. R. & B. Co. v. Marshall*, 12 Id., 165.

trustees to appoint a treasurer, who should pay all the money received into the treasury of the State, to be then divided amongst the officers and soldiers of the Virginia lines; to sell fifty more lots; to sue trespassers, &c., &c.

Under these acts, the trustees laid off the town of Columbus into lots, streets, alleys, and public grounds, and made and recorded a plan therefor, by which they left an open space of ten poles, as a common, along the margin of the river, between low water-mark and the lots next to the river, and dedicated this common to public use.

In 1825, an act was passed (acts of 1825, chap. 72), the first section of which authorized the trustees, to sell the whole of the in and out lots, provided they should all concur; and the second section authorized the trustees, or a majority of them, to "fix the rates of ferriage across the Mississippi river, and lease out ferries for any term of years, not exceeding five, and apply the rents to the improvement of the town."

\*In 1829 (acts of that year, page 31), it was provided, by an act passed in that year.—"That a public ferry be and the same is hereby established at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot, No. 3, in the town of Columbus, across the Mississippi river to the opposite shore, and that said ferry be in the name, and for the benefit, of said Cates and Walker, their heirs and assigns, forever: provided, however, that said Cates and Walker enter into bond, in the County Court of Hickman, in the penalty of \$1,000, conditioned for the faithful performance of the duties required of other ferry keepers by law in this commonwealth." [\*66]

At the session of 1830 (acts of 1830, chap. 533, page 148), an act was passed restoring the ferry privileges to the town of Columbus. The first section was as follows:—

"That so much of 'An act to establish a warehouse at the mouth of Jonathan's creek, in Calloway county, and for other purposes,' as establishes a public ferry at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot, No. 3, in the town of Columbus, across the Mississippi river to the opposite shore, in the name of the said Cates and Walker, their heirs and assigns, forever, be and the same is hereby repealed; it being satisfactorily proved that lot No. 3, in the town of Columbus, does not bind on the Mississippi river; that the margin of said river, opposite the town of Columbus, in laying off the same, was reserved as a public landing, and belongs to the trustees thereof, for the use of the inhabitants; that, under the laws of this State, the

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trustees of Columbus were vested with ferry privileges from the said public ground, on the margin of the river, across the Mississippi river, for the use of the inhabitants; that said Cates was a lessee of a ferry from the trustees of Columbus, and the said Walker his surety, at the time of granting the ferry hereby repealed; and that no notice of the application to the legislature was given to the said trustees, nor a representation, that a ferry was already established there, made in their petition to the legislature."

The second section repealed the grant to Cates and Walker, and the third section regranted and confirmed to the trustees, and their successors, all the ferry rights and privileges from the public ground, and vested them with power to lease one or more ferries from said public ground, from time to time, not exceeding five years at any one time.

Cates and Walker had complied with the requisitions of the act of 1829, and put their ferry into operation. Cates sold his interest to Walker, and he, dying, devised it to his wife, who continued in the exercise of it until interrupted by the trustees, who claimed the exclusive privilege of ferriage.

In September, 1842, Elizabeth Walker, the plaintiff in error, brought an action of trespass on the case against the trustees, in the \*Hickman Circuit Court. The defendants filed five pleas, but it is only necessary to notice the first. That plea set forth all the aforesaid acts of assembly prior to the act of 1829; averred that the legal title to the land on which the town was situated had been vested for that purpose in trustees, as is above stated; that, upon the sale of the lots, there was a reservation made of all ferry rights to the trustees of the town, for its use; that they had been constantly in the exercise of those rights; that between lot No. 3 and the river there intervened a street, ten poles in width, and between that and the river a "common." From these facts, it deduced and alleged the exclusive ferry right of the defendants, coextensive with the limits of the town on the river, as incident to their alleged legal title to the common, as secured to them by said reservation on the sale of lots, and as granted to them by said prior acts of assembly.

And it therefore further alleged, that the act of 1829, granting a ferry to Cates and Walker, "was unconstitutional and void, being an attempt to impair and divest prior vested rights," &c.; and so justified the defendants for the disturbance and trespass complained of.

To this plea the plaintiff demurred; and, upon argument, the demurrer was overruled. The plaintiff, not filing any



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replication to this plea, judgment was entered for the defendants, for the want of a replication.

Mrs. Walker appealed to the Court of Appeals, where the judgment of the court below was affirmed, and a writ of error brought the case up to this court.

The cause was argued at the present term by *Mr. Crittenden*, for the plaintiff in error, and *Mr. Cates*, for the defendants.

Mr. Justice GRIER delivered the opinion of the court.

This case comes before us by a writ of error to the Court of Appeals of the State of Kentucky.

It has been argued by counsel, on the merits, without noticing the important preliminary question of jurisdiction.

The power intrusted to this court, of reviewing the decisions of State tribunals, is within narrow and well defined limits, and has been, in some instances, looked upon with jealousy. Our decisions may fail to command respect, unless we carefully confine ourselves within the bounds prescribed for us by the constitution and laws. If they have not conferred jurisdiction, the consent of parties will not justify its assumption. The record in this case shows, that the plaintiff declared, in an action on the case, for a disturbance of her right of ferry; asserting an exclusive right, in herself, by virtue of an act of the legislature of Kentucky, of the 31st of December, 1829. The defendants' first plea (the only one sustained by the \*court), after averring a previous [\*68 grant to themselves, by an act of the 27th of December, 1820, and other facts, unnecessary to notice, concludes as follows:—"And so the defendants say that the said act, dated the 31st of December, 1829, purporting to establish a public ferry at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot No. 3, in the town of Columbus, over the Mississippi river to the opposite shore, is unconstitutional and void, being an attempt to impair prior vested rights, without compensation therefor; all of which defendants are ready to verify," &c.

To this plea the plaintiff demurred; the defendants joined in demurrer, and the Circuit Court of Kentucky gave judgment for defendants. The plaintiff then appealed to the Court of Appeals of that State, who affirmed the judgment of the Circuit Court.

The record, therefore, presented this single issue,—  
"Whether the act of the legislature of Kentucky, of the 21st of December, 1829, under which the plaintiff claimed title,

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was unconstitutional and void," as being repugnant to the constitution of the United States, and the decision of the Court of Appeals, is against its validity.

The twenty-fifth section of the act of the 24th of September, 1789, which confers on this court the power of supervision over the State tribunals, so far as at present applicable, confines it to cases "where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the constitution or laws of the United States, and the decision is in favor of such their validity." That this case does not come within the category, is too plain to admit of argument or require authority. The reason and policy of granting to this court the power to revise the decisions of the State courts when in favor of the validity of their own statutes, and refusing it to us when the judgment is against their validity, are obvious, and are fully stated by the court in the case of *The Commonwealth Bank of Kentucky v. Thomas Griffith et al.*, 14 Pet., 56. That case is precisely in point with the present, and decides that,—“Under this clause of the act of Congress, three things must concur to give this court jurisdiction. 1st. The validity of a statute of a State must be drawn in question. 2d. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties, or laws of the United States. 3d. The decision of the State court must be in favor of their validity.”

As the judgment of the Court of Appeals of Kentucky was rendered against the validity of the statute in this case, it must be dismissed for want of jurisdiction.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the State of Kentucky, and was \*argued by counsel. On consideration \*69] whereof, it is now here ordered and adjudged by this court that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

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Hildeburn v. Turner.

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**SAMUEL HILDEBURN, PLAINTIFF, v. HENRY TURNER, DEFENDANT.**

When a bill of exchange is made payable at a bank, and the bank itself is the holder of the bill, it is a sufficient demand if the notary presents it at the bank and demands payment.<sup>1</sup>

If, therefore, the protest states this and also that the notary was answered that it could not be paid, it is sufficient. It is not necessary for him to give the name of the person or officer of the bank to whom it was presented, and by whom he was answered.

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the Southern District of Mississippi.

The point of difference is fully set forth in the opinion of the court.

It was argued by *Mr. Brent*, for the plaintiff, and *Mr. Bibb*, for the defendant.

*Mr. Brent*, for plaintiff.

The single question is on the admissibility of the notarial protest; and, if admissible for any purpose, it is competent evidence. The bill of exchange is drawn in Mississippi, payable in Louisiana; and, in such case, the protest is evidence by the law merchant. 2 Pet., 593; 2 Pet., 691; *Waldron v. Turpin*, 15 La., 555; 5 Mar. La., N. s., 513. On this head, I also refer to the statute of Louisiana, 1827 (Bull. & C. Dig., 13, 48), and to 14 La., 394; *Franklin v. Verbois*, 6 Id., 730. The demand is presumed to be made in business hours. *Fleming v. Fulton*, 6 How. (Miss.), 484. I also refer to the decision of this court in *Musson v. Lake*, 4 How., 262, and to *Brandon & Lofftus v. Whitehead*, 4 Id., 127; also to *Bank of the United States v. Carneal*, 2 Ret., 549.

*Mr. Bibb*, for defendant.

The objection taken to the reading of the protest offered in evidence was, that the protest did not contain a sufficient statement of the presentment of the bill for payment.

The bill was drawn by A. G. Bennett, at Canton, Mississippi, on H. F. Bennett, at same place, in favor of Henry Turner, in New Orleans, for \$995.04, payable at the Mer-

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<sup>1</sup> It must, however, appear that the presentment was made at the bank, and it is not sufficient to say merely that it was made to the cashier of the

bank. *Seneca Co. Bank v. Neass*, 5 Den. (N. Y.), 329.

As to what the notary's protest is evidence of, see *McAfee v. Doremus*, ante, \*63, and note.

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\*70] chants' Bank of New \*Orleans twelve months after date. Accepted by H. F. Bennett, indorsed to Samuel Hildeburn by Henry Turner, and to A. H. Wallace & Co., by the indorsee, Hildeburn.

The notary in his protest for non-payment states,—“At the request of the Merchants' Bank of New Orleans, holder,” “I presented said draft to the proper officer at the Merchants' Bank, where the same is made payable, and demanded payment thereof. I was answered that the same could not be paid.” Whereupon he protested, &c.

No person is named to whom he presented the bill for payment.

The notary has undertaken to judge a matter of law, instead of certifying the name of the person supposed to be the proper officer of the bank. Was he the president, or the cashier, or a director? Who was he? What was his name?

The notary presented the bill to an officer of the holder, and demanded payment of the holder's servant or agent.

The notary should have exhibited the bill openly and publicly at the bank, and demanded payment openly and publicly, so that all persons at the bank, or in hearing, might have had notice.

As the presentment of the bill was not to the acceptor, nor to any person in his employ, the demand of payment, at the place appointed in the body of the bill, should have been general and public, so that any person interested might have taken up the bill.

The person, the name of the person, to whom the presentment and demand of payment was made, should have been stated.

See Chitty on Bills and Form of Protest (9 Lond. ed.), 462.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a certificate of division from the Circuit Court for the Southern District of Mississippi.

The case stated is this. The plaintiff offered in evidence a bill drawn by A. G. Bennett, at Canton, Mississippi, upon Henry F. Bennett, payable twelve months after date, to the order of Henry Turner, in New Orleans, at the Merchants' Bank there, for nine hundred and ninety five dollars and four cents, which was accepted by the drawee, and indorsed by Turner, the payee, to Hildeburn, the plaintiff. There were also subsequent indorsements upon the bill, which it is not

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material to notice. And in order to show that the bill had been duly presented for payment and refused, the plaintiff offered to read the following notarial protest, upon the back of which was a copy of the bill and acceptance, and the indorsements thereon.

United States of America, State of Louisiana:—

By this public instrument of protest, be it known that, on this fourth day of January, in the year one thousand eight hundred and forty one, at the request of the Merchants' Bank of New Orleans, \*holder of the original, whereof a true copy is on the reverse hereof written, I, Jules Mossy, a notary public in and for the city and parish of New Orleans, State of Louisiana, aforesaid, duly commissioned and sworn, presented said draft to the proper officer at the Merchants' Bank, where the same is made payable, and demanded payment thereof. I was answered that the same could not be paid. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of said draft as against all others whom it may concern, for all exchange, reëxchange, damages, costs, charges, and interests, suffered or to be suffered, for want of payment of the said draft.

Thus done and protested in the presence of George Lanaux and Jas. P. Gilly, witnesses.

In testimony whereof, I grant these presents, under my signature, and the impress of my seal of office, at the city [L. s.] of New Orleans, on the day and year first above written.

(Signed.)

JULES MOSSY, *Notary Public.*

The defendant objected to the reading of this protest, upon the ground that it did not contain a sufficient statement of the presentment of the bill for payment. And upon this question the judges of the Circuit Court were divided in opinion, and thereupon ordered it to be certified to this court.

This protest is not altogether in the language usually employed in instruments of that description, but we think it contains enough to show that the presentment and demand were duly made. Undoubtedly, the principles of justice, and the safety of the commercial community, require that such instruments should be carefully examined, and should not be admitted in evidence unless they show plainly that everything was done which the law requires to charge the indorser.

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But in this case, it appears by the protest that the Merchants' Bank, at which it was payable, was the holder of the bill, and that the notary presented it for payment at the bank, and demanded payment thereof, and was answered that it could not be paid. According to the current of authorities, nothing more need be stated in the protest of a bill of this kind, payable at a bank, and of which the bank is the holder, and it is not necessary to give the name of the person or officer of the bank to whom it was presented, or by whom he was answered. Neither does the statement in this case, that it was presented to the proper officer of the bank, give any additional validity to this protest. For when the law requires the bill to be presented to any particular person or officer of a bank, the protest must show that it was presented accordingly, and it would not be sufficient, to say that he presented it to the proper person or proper officer. In this case, however, the presentment and demand at the place where it was made payable is all that was \*necessary, and as this \*72] appears to have been done, the protest ought to have been received in evidence, and we shall cause it to be certified accordingly to the Circuit Court.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the protest offered in this case ought to have been received as evidence; wherefore, it is now here ordered and adjudged that it be so certified to the said Circuit Court.

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HENRY MILLER, ADMINISTRATOR OF GEORGE MILLER,  
DECEASED, PLAINTIFF IN ERROR, v. BETSEY HERBERT  
AND CAROLINE HERBERT, DEFENDANTS IN ERROR.

Under a statute of Maryland passed in 1796, a deed of manumission is not good unless recorded within six months after its date; and this law is in force in Washington county, District of Columbia.  
The statutes and decisions of Maryland examined.

THIS case was brought up, by writ of error, from the Circuit Court of the District of Columbia, for the county of Washington.

The defendants in error filed their petition in the Circuit Court, by which they claimed a right to their freedom, under a deed of manumission executed to them on the 28th of February, 1842, by their owner, George Miller, who was an inhabitant of Washington county, at the date of the deed, and at the time of his death, and on whose estate the plaintiff in error had taken administration.

The petition, setting out the character of the claim of the defendants in error, was in the following words.

To the Honorable, Judges of the Circuit Court of the District of Columbia for Washington County :

The petition of Betsey Herbert and Caroline Herbert humbly sheweth, that your petitioners were the slaves of George Miller, late of the city of Washington, deceased; that the said decedent, in his lifetime, intending to manumit and set free from slavery your petitioners, caused to be prepared a paper-writing for that purpose, and sent for S. Drury, Esq., a justice of the peace of said county, \*to take his acknowledgment hereof, and also Charles Bowerman and John Hoover to witness the execution thereof; that on the 28th day of February, 1842, the said justice and the said witnesses came to the house of said George Miller, and the said George Miller did then and there, in the presence of the said witnesses, execute the said paper-writing, and did acknowledge the same before the said justice of the peace; but the said witnesses neglected to sign, or did not understand that they were called upon to sign, the said instrument as witnesses; that the said George Miller retained the said paper-writing in his possession until some short time before his death, when he gave it to your petitioners, with instructions to place it in the hands and follow the directions of Mr. John McLelland, of this city, which your petitioners did; and the said John McLelland, discharging the said trust, placed the said paper-writing in the hands of Joseph H. Bradley, Esq., an attorney of this court, who lodged the said paper in the Orphans' Court of the county aforesaid. [\*73

Your petitioners claim that, by the said paper-writing, so executed and delivered, they are entitled to their freedom, and they are advised it was not necessary that the said paper should have been signed by said witnesses, and that the same is a good and operative deed. But if the said deed ought to have been signed by said witnesses, they claim that this

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court, acting as a court of chancery, will permit the execution thereof to be proved now, and will decree the said deed to be put on record.

They further show that, after the delivery of the said deed to your petitioners, the said George Miller departed this life intestate, and that Henry Miller administered on his estate, and now claims them as part of the personal estate of said George Miller, and they pray that he may be summoned and required to show cause why the paper-writing shall not be admitted to record, and your petitioners declared free.

JOSEPH H. BRADLEY, *for petitioners.*

The counsel for the respective parties then filed the following agreement:—

*Agreement of Counsel.*

It is agreed, that if this court shall be of opinion that they would have power, sitting in chancery, to decree the record of the deed, the execution of which was imperfect under the law, because the witnesses did not sign it, "in such case this court shall have the same power to decree or adjudge the said defect to be rectified as it would if sitting as a court of chancery," it being distinctly understood that the facts are not admitted, but proof thereof is required, and the defendant is to offer any legal proof to meet the petitioners' case; and the petitioners are to sustain their petition by competent proof. It being the object of this agreement to avoid the \*74] expense \*of a bill in chancery, and to bring all the questions which may arise at law or in equity before the court under the petition.

JOSEPH H. BRADLEY, *for Petitioners.*

WILLIAM L. BRENT, *for Defendant.*

The instrument relied on in support of the petition, as the deed of manumission from George Miller, and referred to in the bill of exceptions as paper marked A., was in these words:—

To all whom it may concern, be it known that I, George Miller, of Washington county, District of Columbia, for divers good causes and considerations me thereunto moving, have released from slavery, liberated, manumitted and set free, and by these presents do hereby release from slavery, liberate, manumit, and set free, my negro women, one named Betsey Herbert, about forty-two years of age, and the other named Caroline Herbert, about seventeen years of age, both



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able to work and gain a sufficient livelihood and maintenance; and they, the said negro women, named Betsey Herbert and Caroline Herbert, I do declare to be henceforth free, manumitted, and discharged from all manner of service or servitude to me, my executors or administrators, forever.

In witness whereof I have hereunto set my hand and seal, this 28th day of February, in the year of our Lord one thousand eight hundred and forty-two.

GEORGE MILLER. [Seal.]

District of Columbia, Washington County, to wit:

Be it remembered, and it is hereby certified, that on this 28th day of February, in the year of our Lord eighteen hundred and forty-two, personally appeared before me, a justice of the peace in and for said county and district, George Miller, and acknowledged the foregoing deed or manumission to be his act and deed for the purposes therein mentioned, as witness my hand and seal.

SAMUEL DRURY, J. P. [Seal.]

Issue having been joined upon the right alleged in the petition, and a jury been empannelled to try that issue, the following bill of exceptions was, at the trial, sealed by the judges.

#### Defendant's Bill of Exceptions.

*Betsey and Caroline Herbert, v. Henry Miller, Administrator of George Miller.*

The plaintiffs offered evidence tending to prove that George Miller, who owned and held the slaves, petitioners, sent for a magistrate, Mr. Drury, and also two witnesses to witness the paper marked A., which paper was signed by said Miller in the presence of said witnesses, and acknowledged before said Drury, but was not then, and never was, signed by said intended attesting witnesses, before whom and in whose presence said Miller admitted the deed to be his, and desired said witnesses to attest to the same; to the \*reading of said paper in evidence the defendant objected, and said objection was overruled and excepted to by the defendant. The defendant then offered evidence tending to prove that the paper marked A. was, immediately upon the death of the maker, Miller, which took place about eighteen months after the execution thereof, delivered to Mr. McLelland, by the petitioners, who stated that it was so done by the direction of Miller, and who also stated that they held possession of the paper from the time of its execution until

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that time, and also that Miller, the grantor in said paper A., died largely indebted, and left no property other than said petitioners, sufficient to pay his debts; and also, that defendant has regularly and duly administered upon the estate in this county of said deceased. Whereupon the defendant, by his counsel, moved the court to instruct the jury that upon the evidence aforesaid the plaintiffs are not entitled to recover; which instruction was refused by the court, and the defendant excepts to said refusal, and prays that this his several bills of exceptions may be signed, sealed, and enrolled, which is accordingly done.

W. CRANCH, [Seal.]  
B. THURSTON. [Seal.]

The jury, under the instructions given by the court, found a verdict for the petitioners, viz. that they were free.

To review these two decisions of the court, the case was brought up by writ of error.

It was argued by *Mr. Coze*, for the plaintiff in error, and *Mr. Lawrence*, for the defendants in error.

*Mr. Coze*, for the plaintiff in error, insisted that there was error. First, in admitting the instrument A. to be read in evidence to the jury; and, second, in refusing to instruct the jury that upon the said instrument, which was not recorded within eighteen months after the date, nor at any time during the life of George Miller, the petitioners could not recover.

*Mr. Lawrence*, for defendants in error.

The only facts which can be taken into consideration, in this case, are those which appear in the record. Those facts afford no ground for the assumption, on the other side, that the deed of manumission, now in controversy, was retained in the possession of the grantor until the time of his death, and there is, consequently, no foundation for the argument that has been advanced,—that although this deed was, on the face of it, to take effect *in presenti*, yet it was, as matter of fact, to take effect *in futuro*.

As to the remarks that have been made upon the double aspect in which the petition in the court below is regarded, that is, as a petition for freedom, and in the nature of a bill in equity, this court is referred to the agreement which is  
\*76] made part of the record, and \*in which every defect  
that a court of chancery is competent to remedy, is

to be considered as having been already remedied. This agreement is of special importance, in regard to any objection that might arise in consequence of the deed having been received in evidence in its then existing state.

The whole argument, for the plaintiffs in error, proceeds upon the ground that there was only one class of deeds comprehended in the act of 1796, or, that if there were two classes, they were both to be authenticated in the same manner. I maintain that there were two classes of deeds to be differently authenticated; the one, to take effect *in presenti*, and to be "evidenced" by two witnesses; the other, to take effect *in futuro*, and to be acknowledged and recorded.

This was a deed of immediate emancipation, and was "evidenced" by two witnesses. It is to be presumed that the legislature, in omitting the ordinary and technical words, "attested and subscribed," and making use of a word hardly known in legal phraseology, did so understandingly. This is especially the case, when it is remembered that prior to the act of 1752 (almost in the same words as that of 1796), there was no restraint in the manumission of slaves. Those acts were in restraint of a common right. The word "evidenced" is a verbal derivative from the term evidence, and is equally extensive in signification, unless there is some technical usage to restrict it. There is no such technical usage. Evidence is a word of the largest signification known to the law, and embraces every kind of proof. *Jac. Law Dic.*; 3 *Co. Litt.*, 487; 1 *Greenl. Ev.*, 1; 3 *Bl. Com.*, 367. Wherever any word implying proof, other than the words "attested" or "subscribed," has been used, the uniform decision (except in Maryland) has been, that the subscription of the names is not necessary. 2 *Tuck. Black.*, 308, note; *Turner v. Stip*, 1 *Wash. (Va.)*, 322; 4 *Kent Com.*, 514; 6 *Cruise Dig. (Am. ed.)*, 44, 47, notes.

The case of *James v. Gaither*, 2 *Harr. & J. (Md.)*, 176, has been cited as the Maryland construction of the act of 1796, and as decisive of this case. That case is not of local authority here, in the sense in which this court usually defers to the local construction of local laws. By the act of Congress, the laws of Maryland, then in force, were made the laws of the District of Columbia. But, if it were otherwise, this court would examine the subject *de novo*. *Fenwick v. Chapman*, 9 *Pet.*, 461; *Wallingsford v. Allen*, 10 *Id.*, 593. See opinion of the judges, *seriatim*, on the case of *James v. Gaither*, in 7 *Leigh (Va.)*, 300 *et seq.* But admitting the construction of the Maryland Court of Appeals, in *James v. Gaither*, to be correct, it touches this case only in a single

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point, viz. in the meaning it gives to the term "evidenced." That was a case of future emancipation, and the court decide, \*77] that in such a case the deed must not only be acknowledged and recorded, but also "evidenced" by two witnesses. But it does not decide that the converse of the proposition is true; that deeds *in presenti* must not only be "evidenced," but also acknowledged and recorded. Admit, then, that the act requires the witnesses to subscribe their names, can a court of chancery require or permit it now to be done? There is no time limited, in which it must be done. The act does not, like the statute of wills, require it to be done at the time. Whenever done the terms of the law are satisfied. What is it that is asked?—that the requisitions of the act should be set aside? that merely fictitious names should be inserted, to present to the eye only a compliance with the statute? By no means. But that those who actually were witnesses to the deed should be permitted to put their names to it. The deed, when thus perfected, would present a literal, substantial, and conscientious fulfilment of the requisites of the act.

But it has been objected, that this deed was in prejudice of creditors. To this the answer is, that there is no evidence, in the record, that the grantor was indebted at all, at the time of the execution of the deed. Proof of this fact is necessary. It is, indeed, stated that he died, leaving no other property sufficient to pay his debts. This is too general from which to infer (if this court could indulge in any inference as to the facts) that he was indebted eighteen months before. The decisions, under the 13 Eliz., have uniformly been, that a voluntary deed cannot be avoided by creditors, unless it is shown that the grantor was indebted at the time of its execution; and, in that case, there is a personal disability, and the deed is void, *ab initio*. 4 Cruise Dig., 461, 462; 1 Atk., 93, 94; 1 Madd., 419, 420; 3 Johns. (N. Y.) Ch., 490, 493. But, in this case, there was no such disability shown at the execution of the instrument. The grantor, having done every thing, on his part, had parted with all power over the subject. The act of subscribing, by the witnesses, was merely formal, and no time limited in which it should be done. And although, until that act should be performed, freedom might not pass, still no act of the grantor then could revoke the deed. This view is illustrated by the case of a bargain and sale, under Stat. 27 Hen. 8, requiring enrolment before lands, &c., should pass. It has been decided, under that statute, that if the bargainer dies, or aliens the land, or marries, or becomes bankrupt, after the execution of the deed, and be-

fore its enrolment, and then within the time limited the deed is enrolled, it overrides any and all of these intermediate acts, and takes effect, by relation, from the time of its execution. Shep. Touch., 224, 226; 2 Vin. Abr., 419; 1 Bac. Abr., 688; 7 Leigh (Va.), 696, 711, 712. There can be no difference, as to the law of relation, whether the formal act, remaining to be done, be enrolment or attestation; nor whether a time be or be not limited in the statute.

\*As to the aid which courts of equity will extend in carrying into effect instruments of emancipation, cited [\*78 1 Hen. & M. (Va.), 519; 2 Id., 132; 1 Leigh (Va.), 465; 6 Rand. (Va.), 162.

Mr. Justice DANIEL, after having read the statement of the case at the commencement of this report, proceeded to deliver the opinion of the court.

By the statute of Maryland, passed in 1715, cap. 44, § 22, it is enacted,—“That all negroes, and other slaves then imported, and their children, then born or thereafter to be born, shall be slaves for life.” Upon examining the legislation of Maryland, from the period of the law of 1715, a variety of enactments will be seen, showing the policy of this State in the government of her slave population; and, as entering essentially into that policy, must be considered the several regulations under which she has permitted manumission, either by deed or by will. The enactment here referred to may be found in Kilty’s Laws, vol. 1, session of 1752, cap. 1, where they are collated, by their dates, down to the act of December 31st, 1796, under which last mentioned statute the questions now before this court have immediately arisen. In the interpretation given to these statutes by the tribunals of the State, one characteristic will impress itself on every mind; and that is, the strictness with which the laws have been expounded in reference to the power of manumission conferred by them. It seems to have been thought that very little, or indeed nothing, was permitted by the policy of the State to construction or implication, but that rather the conditions prescribed for the exercise of the power conceded should be fulfilled almost to the letter. Of the propriety of views such as these, on the part of the State, with regard to her own internal policy, no just ground of complaint can be alleged; but of the reality of those views, a reference to a few of the adjudications of her courts will leave no doubt. By the Stat. of 1752, cap. 1, § 5, manumission was allowed, by writing under bond and seal, “evidenced by two good witnesses at least.” Under this statute arose the case of negro *James v.*

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*Gaither*, which was a claim to freedom, upon a writing signed and sealed, but subscribed by a single witness only. Parol proof being offered to establish the fact, that the deed was executed in the presence of another witness, who did not attest it by subscription, the Court of Appeals ruled such proof to be incompetent and inadmissible under the statute. See 2 Harr. & J. (Md.), 176.

The case of *Wicks v. Chew et al.*, 4 Harr. & J. (Md.), 543, a case arising under the statute of 1796, is yet more strongly illustrative of the rule above mentioned. By the statute just referred to, chap. 67, § 29 (Kilty's Laws), deeds of manumission are required to be recorded within six months from their date. By another statute of Maryland, passed in 1785 \*79] (Kilty's Laws, chap. 72), it is \*provided, in the third section thereof,—“That in case any deed hath been or hereafter shall be executed, to the validity of which deed *recording* is necessary, and such deed hath not been or shall not be recorded agreeably to law, without any fraudulent intention of the party claiming under the same, the chancellor, upon petition of the party to whom the said deed was executed, or of his, her, or their legal representative, or of any of them claiming the land or *other thing* conveyed or intended to be conveyed by such deed, and without the appearance or hearing of the defendant or defendants, shall have power to decree the recording of the said deed in the county or general court records, within such time from the date of the decree as it ought originally to have been recorded from the date of the deed”; giving to the deed, when thus admitted to record, the same effect it would have had if the irregularity thus cured had never occurred. Chew and others, claiming freedom under a deed from Darnell, against Wicks and others, heirs and devisees of Darnell, filed their petition with the chancellor, stating that Darnell had died without putting the deed on record within the six months prescribed by law, and praying the chancellor, upon due notice to the heirs and devisees, to decree that the deed be recorded, that thereby validity might be restored to it. The chancellor, deeming himself so authorized by the third section of the act of 1785, decreed that the deed be admitted to record within six months from the date of his decree. The Court of Appeals reversed this decision of the chancellor, and the reasoning of the court conclusively shows the principle on which they place these instruments of manumission, and on which they distinguish them from transactions with a party who is *sui juris*. They declare that the statute of 1785 embraces only cases of mutual but inchoate rights, but still of rights founded on some valid

consideration, such as courts can take notice of and enforce; that manumission by the laws of Maryland is a mere gratuity, and until evidenced by all the acts or requisites the law prescribes, has no legal existence, and can have created no faculty in the contemplated object of that gratuity. The language of the Court of Appeals is as follows:—"The acts of assembly referred to (i. e. by the chancellor in support of his decree) are not intended to give relief in cases which were before without remedy, but to give an additional remedy by enabling a party, acquiring equitable rights under a deed not operative in law for want of recording, to perfect those rights, by applying to the chancellor to order the original instrument to be recorded, and thus to give it the effect which by law it would have had if recorded in due time, instead of going into chancery to compel a conveyance, or enforce a specific performance. They are intended to give an *accumulative* remedy to persons *able to contract*, and who by deed acquire rights which equity will protect, with the power to prosecute those rights. But by the laws of this State, a negro, so long as he is a slave, can have \*no rights adverse to those of his master; he can neither sue nor be sued, nor can he make any contract or acquire any rights under a deed which a court of law or equity can enforce. And as it is the *recording* of a deed of manumission within the time prescribed by law, which entitles him to his freedom, he continues a slave and can acquire no rights under such an instrument until it is so recorded, and consequently cannot go either into a court of law or equity for relief of any kind." Again, the court say in this case, that—"A master may execute and acknowledge a deed of manumission, and afterwards destroy it or keep it, and refuse to have it recorded, and the slave remains a slave without redress." Another striking instance of the rule of interpretation of their own statutes, adopted by the courts of Maryland, is found in the case of negro *Anna Maria Wright v. Lloyl N. Rogers*, reported in 9 Gill & J. (Md.), 181. In this case, Tilghman, the owner of the female slave, executed and delivered to her, in 1832, a deed of manumission, which was duly acknowledged but not recorded. Subsequently, Tilghman sold and conveyed the same slave by bill of sale, duly acknowledged and recorded, to a purchaser who had notice at the time of the previous deed of manumission. This purchaser afterwards sold the slave to Rogers, to whom, in 1833, he executed and delivered a bill of sale, which was acknowledged and recorded according to law. The legislature, at their session, December, 1834, passed a special law, authorizing the deed of manumission to be recorded, providing

further that the same when recorded should be as valid and effectual for every purpose as if it had been duly recorded according to law. After the deed had been recorded pursuant to this law, the negro filed her petition for freedom; the judgment of the County Court was against her title, and that judgment was affirmed by the Court of Appeals.

By the 29th section of the statute of 1796 (Kilty's Laws, chap. 67), the power of manumission by writing under seal was reenacted from previous statutes, enumerated, and repealed in the 31st section of the act of 1796. In the 29th section, many of the conditions contained in the prior laws are prescribed, and amongst these are the requisitions, that the slave to be emancipated shall be sound in mind and body, and not over 45 years of age; that the deed of manumission shall not be in prejudice of creditors; that it shall be acknowledged before a magistrate, and entered amongst the records of the County Court where the person or persons granting such freedom shall reside, *within six months from the date of such instrument of writing*. Upon the construction of this section of the act of 1796 arose the questions presented to the court below, and now brought here for adjudication. These questions are various, as appears by the bill of exceptions sealed by the judges of the Circuit Court, and by the assignment of errors upon the record; but they are all necessarily subordinate to a decision upon the validity of the \*instrument of manumission as affected by the failure to record it within six months from its date. This omission is admitted in the petition for freedom, and is made out by the proofs upon which the instruction prayed by the defendant in the courts below was asked and refused, and it remains to be considered how far such omission operated to destroy all foundation of the right sought to be asserted in this case. This inquiry, as a question of Maryland law, we think is without difficulty. The decisions already quoted are clear and explicit. They treat the right asserted and the instrument alleged in evidence thereof as having no legal existence, as nullities to all intents and purposes, and therefore as nothing of which common law or equity can take cognizance, until that right and the pretended evidence of it can be brought forward, attended with every mark and attribute of being, which the statute has called for, and one of these, as clearly defined as any other, is *admission to record*. This indeed is treated as the great, the capital test of existence, for it is this which places the transaction definitely beyond the control of the master, and proclaims, beyond the power of denial, both the intent and its consummation. And why should this not



be treated as a question of Maryland law. The statutes of Maryland in being at the cession of the District of Columbia were adopted as the laws of the county of Washington, to be there enforced until altered by authority of Congress, and the rights of person and of property vested or existing under those laws, and all interpretations of those laws by the supreme tribunal of Maryland, became in like manner the rules of right within the same county. This case, too, is one of a right sought to be maintained under a Maryland statute, a right which seeks to lay its foundation in the terms of that statute, and no where else. But whilst it is conceded as a general proposition that the laws of Maryland, at the period of the cession of the District of Columbia, are laws of the county of Washington till changed by the authority of Congress, it has been urged that, in instances in which the Maryland statutes have received no settled interpretation by the Maryland courts anterior to the cession of this district, the federal courts are free to interpret the provisions of those statutes as they would be to pass upon any other subject of original cognizance, and would not be bound by decisions of the State courts made posterior to the cession. This position is not denied; it has indeed been sanctioned by this court in the cases of *Fenwick v. Chapman*, 9 Pet., 461, and *Wallingsford v. Allen*, 10 Id., 583. But admitting this position fully, still we must also admit that the courts of the United States would feel great respect for the decisions of the State courts upon questions essentially connected with the general internal policy of the State, nay, would yield to those opinions upon matters of doubtful construction, or wherever well ascertained and paramount obligations did not forbid such an acquiescence. But the statute of 1796 was anterior to the cession of the District of \*Colum- [\*82  
bia; and although the cases of *Wicks v. Chew et al.*, 4 Harr. & J. (Md.), and of *Anna Maria Wright v. Rogers*, 9 Gill & J. (Md.), were posterior to that event, still these cases cannot be correctly understood as deciding any new question, or as introducing any principle not well settled long before it. The case of *James v. Gaither* occurred under the statute of 1752, and upon an instrument of manumission executed in 1784; the statute of 1796, too, is a reënactment of provisions of other statutes, going back as far as the year 1752, and the decision in *James v. Gaither*, and in the subsequent cases, are nothing more than the repeated expositions of a settled policy or rule of interpretation of the Maryland statutes, viz. that the conditions prescribed by them must be strictly fulfilled; that without such fulfilment any pretended instrument of manumission must be treated as a nullity, and can impart

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no rights, can give no standing in court, either at law or in equity. We think then that this is a question of Maryland law, which has been settled by the courts of Maryland, and should not now be disturbed; that in conformity with decisions of those courts, the recording of the deed of manumission in this case, within the time prescribed by the statute of 1796, was an indispensable prerequisite to confer any rights on the petitioners in the court below, or to give them any standing in a court of law or equity; that in accordance with this interpretation of the statute, the Circuit Court should have given the instruction asked for by the counsel for the defendants; that in refusing to give such instruction that court has erred, and therefore its decision should be reversed.

In reference to the agreement signed by counsel and annexed to the record in this case, and by which all the powers that a court of equity could properly exert in aid of instruments defectively executed were conceded to the Circuit Court as if sitting as a court of equity, we remark that the grounds presented by that agreement are entirely covered by the opinion above expressed of the absolute nullity of the deed in question, it being no more within the powers of a court of equity than it is within those of a court of law, to set up and establish that which is illegal or wholly void.

#### ORDER.

This case came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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\*83] \*THE ALEXANDRIA CANAL COMPANY, PLAINTIFF IN  
ERROR, v. FRANCIS SWANN, DEFENDANT.

Where a case is removed from Alexandria county to Washington county, in the District of Columbia, whatever defences might have been made in Alexandria county, either as to the form of the action or upon any other ground, or whatever would have been a bar to the action, may all be relied upon in the new forum.

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But the mode of proceeding, by which the rights of the parties are determined, must be regulated by the law of the court to which the suit is transferred.

A reference to arbitrators, therefore, which is sanctioned by the laws of Maryland, governing Washington county, is not to be overthrown because it is not sanctioned by the laws of Virginia, governing Alexandria county.

The validity of the reference, and of the proceedings and judgment upon it, must be tested by the laws of Maryland.

Although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment.<sup>1</sup>

So, also, a power to agree with a proprietor for the purchase or use of land, includes a power to agree to pay a specified sum or such sum as arbitrators may fix upon.

It is immaterial whether the power of reference is lodged in the president and directors or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party.

Where the order of reference provides for the appointment of an umpire, it is no error if he is appointed before the referees had heard the evidence and discovered that they could not agree.

Where the agreement for reference contained a clause, providing that upon payment of damages to the owner of the land he should convey it to the other party, it was proper for the umpire to omit all notice of this. It was not put in issue by the pleadings, nor referred to the arbitrators.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, in and for the county of Washington. It originated in the county of Alexandria, and was removed to the county of

<sup>1</sup> APPROVED. *Heckers v. Fowler*, 2 Wall., 128.

There no longer exists any doubt that a corporation may be a party to a submission, and several cases have affirmed the proposition. *Brady v. Mayor of Brooklyn*, 1 Barb. (N. Y.), 594; *Attorney-General v. Clements*, 1 Turn. & R., 58. In the latter case the award was enforced against a corporation.

The greatest difficulty is, who has power to submit to the reference? In England it is said that the reference must be an act of the corporate body. *Russell on Arbitration*, 20 (4th ed.). "A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them. [Citing Bac. Ab. Arb. C., Ed. IV., 13.] But where the body corporate properly enter into a submission, the award is binding upon them." *Id.*, 20.

In the principal case, counsel agreed

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to the submission. In *Wood v. Auburn & Rochester R. R. Co.*, 8 N. Y., 160, it was held that an agent and sub-agent, having repeatedly made submission, had power to bind the corporation by a submission. The directors of an insurance company entered on their books a proposal to arbitrate a disputed claim, and also entered a request to the claimant to join with the secretary in selecting the arbitrators; and it was held that the secretary had power to execute a submission for the company under the corporate seal, that was binding on the company. *Madison Ins. Co. v. Griffin*, 3 Ind., 277; see *Indiana Central R'y Co. v. Bradley*, 7 Ind., 49; *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. (Me.), 38. In Connecticut it is held that the selectmen of a town cannot submit the town affairs to an arbitration. *Griswold v. North Stonington*, 5 Conn., 367; *contra*, *Dix v. Town of Dummelston*, 19 Vt., 262; *Boston v. Brazer*, 11 Mass., 447; *Shawneetown v. Baker*, 85 Ill., 563.

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Washington under an act of Congress providing for such removals.

The circumstances of the case are so fully set forth in the opinion of the court, that it is unnecessary to do more than refer to it for a statement of the facts.

The cause was argued at December term, 1845, by *Mr. Bledsoe* and *Mr. Coxe*, for the plaintiff in error, and by *Mr. William T. Swann* and *Mr. Jones*, for the defendant in error. At the present term the court gave its opinion.

*Mr. Bledsoe*, for the plaintiff in error, contended,—

1. That there was no legal or valid reference.
2. That there was no legal or valid award.
3. That there was no legal or valid judgment.

1. The president and directors had no power under their charter to submit a case to arbitration. The rule is well settled that they have no power except under the charter. 5 Conn., 568; 2 Cranch, 158; *Angell & A. Corp.*, 200, 201, 229, \*84] 242; \*7 Cranch, 299; 14 Johns. (N. Y.), 118; 12 Id., 241; 15 Wend. (N. Y.), 256; 7 Cow. (N. Y.), 462; 1 Id., 513; 12 Wheat., 58.

The charter (Davis's Laws, 558) says, that where land is to be taken, the company may agree as to the price. But if no agreement can be made, they are to apply to justices of the peace, who are to call a jury. But in that case the whole twelve must agree.

The thirteenth section of the act thus pointing out the mode of condemning land, none other was justifiable. The seventeenth section gives the company the right to enter upon land, and therefore they cannot be guilty of a trespass.

One party cannot bind another by agreeing to arbitrate. *Wat.*, Part., 445; 8 Bing., 101; 11 Eng. Com. L., 52; *Story*, Part., 169; 1 Pet., 222, 228.

The attorney here has undertaken to make the president and directors do things which are not justified by law.

In England, where property is taken for public use, the party has no remedy; and in this case the remedy given by the charter is exclusive. 11 Mass., 364, 365, 368; 20 Johns. (N. Y.), 735; 4 Wend. (N. Y.), 347, 367, 370; 4 N. H., 547; 2 Johns. (N. Y.), 283; 7 Johns. (N. Y.) Ch., 315; 1 N. H., 389.

*Mr. Bledsoe* then examined the terms and mode of arbitration.

*Mr. William T. Swann*, for the defendant in error, made the following points:—

1. It will be necessary to consider any part of the record prior to the submission of the case to arbitration; as the submission in such a case, under a rule of the court, operates as a waiver of all exceptions (if any could be conceived), or as a release of all errors anterior to the rule.

2. No exceptions having been taken in the court below to the award, the grounds of the appeal are unknown; nor can any, by the counsel in this case, be conceived. But if any objections could be presented, it is now too late; they should have been presented either by motion or exception in the court below.

3. In this case the award is supported by a recital of various matters of procedure under the arbitration in the award itself, by the certificate of two of the arbitrators, and by affidavits proving such matters of procedure in the case. This is a support far beyond what the law requires. A simple award of a sum of money under the submission, without any recital of such facts in the award, and without any proof of them, is sufficient; any omission or irregularity in regard to such extrinsic matters being brought forward by motion in the court below to set aside the award.

*Mr. Swann* then examined the record, and contended that the arbitration was according to law. The other matters of defence, he said, cannot be alleged here. There is no special plea in \*Washington county, and we do not admit the facts upon which the argument rests. The charter [\*85 does not give the remedy spoken of to the party aggrieved, because he cannot originate the process of summoning a jury, &c. 4 Gill & J. (Md.), 147; 4 Wend. (N. Y.), 667, 672.

If the company have power to enter land without condemnation, it ought to have been specially pleaded.

A submission of a cause to arbitration disembarrasses it of legal questions. 1 Wash., 320; 10 Mass., 215; 8 Serg. & R. (Pa.), 3; 4 Hen. & M. (Pa.), 216; 5 Binn. (Pa.), 177. The statute of Maryland, passed in 1778, ch. 21, §§ 8, 9, points out the mode of proceeding by arbitration. It is a common law process, too. The power to refer is a necessary incident to the power to be sued. If the company are sued they can defend themselves in any manner known to the laws. The submission in this case was by the company itself, and not by the president and directors only. The attorney in court represented the whole company.

*Mr. Jones*, on the same side.

If they object to the award they should have moved, in the court below, to set it aside. Otherwise it is presumed to be right. It is too late to urge the objections in an appellate court, because, as the court below never passed a judgment upon the point, it would make this a court of original jurisdiction. 2 Sch. and L., 712. When the cause was removed, it was to be tried by *lex fori*, of which arbitration is a part. It is denied that the president and directors had any power to submit the case. But how does it appear that the president and directors did it, and not the company? A corporation can only appear by its corporate name. This suit was so brought and they appeared to it. So the power of the attorney is denied. But will the court presume that he acted without authority? A corporation is liable for a tort. 16 East, 5; Ang. & A. Corp., 328, 329; 8 Pet., 117.

*Mr. Coxe*, for plaintiff in error, in reply and conclusion, examined the history of the law of arbitration, and the statutes of Virginia and Maryland; and then contended that an action of trespass *quare clausum fregit* would not lie against a corporation. He then examined the authorities cited by *Mr. Jones*. If the corporation kept within their charter they were not suable, of course. If they went beyond it, and appointed agents to do things not justified by law, the agents are responsible. A suit only lies against the employer when the agent is acting within the scope of his authority. This suit was brought in Alexandria, where the corporation appeared by attorney and filed pleas. When it was removed to Washington an amended declaration was filed, but it was  
 \*86] not a \*substitute for the old one, because the old one remained in court, and so did the former pleas.

*Mr. Coxe* then contended that the reference was improper and illegal, and cited *Kyd, Corp.*, 45, and commented on the charter of the company.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by writ of error from the Circuit Court for Washington county, in the District of Columbia. The suit was originally brought in Alexandria county by the defendant in error, against the plaintiff; and upon the motion of the former was removed to Washington county under the provisions of the act of June 24, 1812, § 3. The points raised in the argument make it proper to state the pleadings more fully than is usually necessary.

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It was an action of trespass for breaking and entering the plaintiff's close, situate in the county of Alexandria. The suit was brought in July, 1839. The declaration contained but one count, in the usual form, stating the trespass to have been committed on divers days and times between the 1st of January, 1835, and the commencement of the suit.

The defendant pleaded,—first, not guilty; second, the statute of limitations; and third, that the canal company entered under the authority of the act of Congress, for the purpose of making the canal; and that it is ready to satisfy any damages to which the plaintiff is entitled, when they shall be ascertained in the mode pointed out in the act of incorporation.

After these pleas were put in, and before any replication was filed or issue joined, the cause was removed to the Circuit Court for the county of Washington, by an order passed on the 12th of November, 1841, upon the motion of the defendant in error. The case was continued in that court without any alteration in the pleadings until November term, 1842, when an amended declaration was filed. This declaration consisted of a single count, and differed from the original one only in undertaking to set out the abutments of the close in which the trespass was alleged to have been committed. The defendant in the Circuit Court pleaded not guilty to this declaration, upon which issue was joined and a jury sworn; but before a verdict was rendered a juror was withdrawn by consent, and upon the motion of the parties by their attorneys the matter in variance between them was by a rule of Court referred to four arbitrators named in the order of reference. The reference was made upon certain terms specified in a written agreement filed in the case, setting forth the manner in which the arbitrators were to be selected and the damages calculated, with power to the referees to choose an umpire, if they or a majority of them could not agree.

\*The arbitrators, before they entered upon an examination of the case, appointed an umpire, who afterwards made his award, and thereby awarded that the defendant (in the District Court) should pay to the plaintiff the sum of six thousand nine hundred and sixty eight dollars and seventy five cents, in full satisfaction of all the matters of damage and value submitted to his umpirage. This award was filed September 21, 1843, and notice of it regularly served on the plaintiff in error; and thereupon a judgment was entered for the amount awarded on the 17th of January, 1844. It is upon this judgment that the present writ of error is brought. [\*87]

It appears from the record that no objection was taken to the award in the Circuit Court, nor any affidavits filed to impeach it. Several depositions were filed by the defendant in error, which are not material to this decision, except in one particular, which will be hereafter noticed, on account of an objection to the award founded upon it.

The reference to arbitrators and the proceedings thereon, and the judgment given by the court below, were all under and intended to be pursuant to the acts of assembly of Maryland of 1788, ch. 21, § 9, and 1785, ch. 30, § 11. It is admitted that these proceedings were not authorized by the laws in force in Alexandria county; and it is objected by the plaintiff in error that, inasmuch as no judgment could have been lawfully rendered upon these proceedings in Alexandria county, no judgment ought to have been rendered upon them in Washington; that the removal of a case under the laws of Congress is a mere change of *venue*; and that the rights of the parties are still to be tried according to the laws and modes of proceeding recognized and established in the Circuit Court for the county in which the suit was originally instituted.

Undoubtedly, whatever rights the canal company had in Alexandria county, and whatever defences it might there have made, either as to the form of the action or upon any other ground, it might still rely upon them in the new *forum*; and whatever would have been a bar to the action in Alexandria county would be equally a bar in Washington. The question here, however, is not upon the rights of the respective parties, but upon the mode of proceeding by which they were determined; and this must evidently be regulated by the law of the court to which the suit was transferred. For after the removal took place the action, according to the act of Congress, was pending in Washington county, to be there prosecuted and tried, and the judgment of that court to be carried into execution. And as the act neither directs nor authorizes any change in its practice or proceedings in removed cases, it follows that they must be prosecuted and tried like other actions in that court, and could not lawfully be prosecuted and tried in any other manner. In impanelling a jury, for example, for the trial of the facts, it could not put aside \*88] the jurors required by law to attend that court, and \*direct a panel of twelve to be summoned for the particular case, pursuant to the law of Virginia. Nor could it deny to either party the right to strike off four names from the list of twenty, according to the law of Washington county,



although the rule is otherwise in the county of Alexandria.<sup>1</sup> And upon the same principles the selection of arbitrators, the proceedings before them, and the legal effect of their award, could be no more influenced by the law upon that subject, on the other side of the Potomac, than the summoning, striking, and impanelling of a jury. The validity of the reference, therefore, and of the proceedings and judgment upon it, must depend upon the law of Maryland and not upon the law of Virginia. And if the judgment given by the Circuit Court was authorized by the former, it cannot be impeached upon the ground that such proceedings would not have been lawful in Alexandria county.

Trying the case upon these principles, it is very clear that as no objection was taken to the award in the Circuit Court, the judgment upon it was correct and must be affirmed in this court, unless some substantial objection appears on the face of the proceedings or in the award itself.

It has been urged, however, that it is apparent, on the face of the proceedings, that the arbitrators committed a mistake in the law; that the record shows the acts complained of to have been done in execution of the power conferred on the company to construct a canal; and that under the act of Congress they had a right to enter upon any land they deemed necessary for that purpose, leaving the damages to be afterwards ascertained in the mode pointed out by the law; and that consequently an action of trespass will not lie.

But it is very clear that this question of law was not before the referees or the court; nor was it in any way involved in the decision of either. For if the plaintiff in error could have justified the entry upon the ground suggested, the justification ought to have been pleaded. And as this was not done, the question as to the legal sufficiency of this defence

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<sup>1</sup> By a statute in Indiana, in civil cases tried before a justice of the peace, each party had the right to make four peremptory challenges to jurors called to by the cause. Such cases were appealable to the Circuit Court, and were there tried *de novo*. In the Circuit Court, in cases first commenced there, each party had only three peremptory challenges. On the appeal of a case from a justice of the peace to the Circuit Court, it was held that either party had only three challenges in the latter court, and that

the practice of the justice's court, except as to the pleadings, was superseded by that of the Circuit Court. *Vanschorick v. Farrow*, 25 Ind., 310; and this was held to be so even though the statute allowing the appeal provided that the case on appeal should be "tried under the same rules and regulations prescribed for trial before justices." It was held that the phrase quoted related, not to the organization of any part of the court, but to the trial in the legal sense of that term. *Kerschner v. Cullen*, 27 Ind., 184.

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was not referred to the arbitrators nor decided upon by their award.

It is said, however, that it *was* pleaded. This is true as relates to the pleadings filed to the original declaration. But an amended declaration was subsequently filed, and to this the plaintiff in error pleaded anew. The amended declaration was not an additional count to the former one, but was itself the entire declaration substituted for the former. And it was evidently so regarded by all parties at the time. For the plaintiff in error renewed his plea of not guilty, which he had put into the former one,—omitting, however, his former pleas of limitation and justification; and these two must have been understood to be waived, for there was no replication to either of them, nor any issue joined upon them, formal or informal. The questions, therefore, which would have arisen \*89] on these pleas, \*were not in issue,—were not referred by the written agreement,—and consequently could not have been considered or decided by the arbitrators.

Neither can the objection be maintained which has been taken to the power of the company under its charter to refer such a question of damage. The corporation was a party to the action in court, and it might lawfully take any step that an individual might take, under like circumstances, to bring it to final judgment. And a trial by arbitrators, appointed by the court with the consent of both parties, is one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury.<sup>1</sup>

But independently of this principle and of the pendency of a suit, the thirteenth section of the act of Congress authorizes the canal company to agree to a reference. It provides that the president and directors may agree with the proprietor for the purchase, or for the use and occupation of the land for temporary purposes; and it does not confine the power to an agreement specifying a particular sum of money. On the contrary, it authorizes an agreement in general terms. And if the company agree to pay such sum as arbitrators may award, this agreement is as clearly within the words and intention of the law as if a specific sum had been fixed upon by the parties. We therefore see no objection to the reference in this case, nor to the agreement by which it was made.

We do not think it necessary to inquire whether the power to direct the proceedings in the suit and assent to the refer-

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<sup>1</sup> APPROVED. *Heckers v. Fowler*, 2 s. c., Fed. Rep., 374. See also 1 Russ. Wall., 128. CITED. *Town of Lyons & G. (Nov. Sc.)*, 115, 116. *v. Lyons Nat. Bank*, 19 Blatch., 286;

ence belonged to the president and directors, or to the stockholders assembled in general meeting. The corporation, however governed in this particular, was the party defendant in court, and was represented by its counsel, and his acts are presumed to be authorized by the party in conducting the suit. This has long been the settled law of Maryland, which is the law of Washington county.

It is true that in this case the agreement for the reference is signed by the counsel who had appeared for the canal company in Alexandria, but who did not appear on the record in the Circuit Court for Washington. Yet the attorney who did appear joined in the motion for the reference, received notice of the award after it was returned, and made no objection to the authority under which the arbitrators had been appointed. It is too late to make it here, even if it would have been available in the Circuit Court. But as the attorney on the record must have united in the motion for the reference, it is very clear that the objection would have been untenable there, as well as here.

We see nothing, therefore, in the pleadings or proceedings anterior to the order of reference, which can impeach the correctness of the judgment in the court below. It remains only to examine whether there is any thing liable to objection in the proceedings of the referees or in the award returned by the umpire.

\*The authority of the umpire has been objected to, because it appears, by the affidavits filed by the defendant in error, that he was appointed before the referees had heard the evidence and discovered that they could not agree. But whatever doubts may have been once entertained upon this question, it is now well settled both upon principle and authority that the appointment is good. And indeed it has been said by this court that it is more expedient to appoint the umpire in the first instance, as was done here, than to wait until the evidence was all heard and the arbitrators had finally differed. 8 Pet., 178. [\*90]

The umpire, therefore, being regularly appointed, the remaining question is upon the sufficiency of his award. There was no dispute as to the title to the land, and upon the issue joined in the case; therefore, the only matter in controversy was, whether the acts complained of had been committed, and if they had, what damage was the defendant in error entitled to recover. This was the only matter in variance referred. The written agreement filed by the parties states the principles upon which they mutually agreed that the amount of damages should be calculated; and the award of the umpire

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ascertains and awards the amount upon the principles mentioned in the agreement. His award is upon the subject-matter referred. It covers the whole controversy submitted to him, and nothing more; and upon that it is certain and final.

There is indeed in the written agreement for the reference a clause which provides that, upon the payment for the damages awarded, the defendant in error should convey to the company the land selected for permanent occupation; and the umpire has taken no notice of this agreement to convey. We think he very properly omitted to notice it, for it was not put in issue by the pleadings, nor proposed to be referred in the argument filed. On the contrary, the duty of the arbitrators was limited to the question of damage. The value of this land was indeed one of the items they were required to consider in calculating the amount of damage; but they had no power to award how or when it should be conveyed. Nor does the right of the canal company to the conveyance depend in any degree upon the award or direction of the arbitrators concerning it. Their right is absolute by the agreement, upon the payment of the damages awarded; and the conveyance may be enforced like any other right acquired by contract.

Upon the whole, we are of opinion that there is no error in the judgment of the Circuit Court; and it must therefore be affirmed, with costs.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was \*argued by counsel. On consideration \*91] whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

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HENRY D. BRIDGES, JOHN K. MABRAY, JAMES N. HARPER,  
AND STERN SIMMONDS, LATE MERCHANTS AND PART-  
NERS IN TRADE, UNDER THE NAME, FIRM, AND STYLE  
OF BRIDGES, MABRAY, AND COMPANY, PLAINTIFFS IN  
ERROR, v. WILLIAM ARMOUR, HENRY LAKE, AND FELIX  
WALKER, LATE MERCHANTS AND PARTNERS IN TRADE,  
UNDER THE NAME, FIRM, AND STYLE OF ARMOUR, LAKE,  
AND WALKER, DEFENDANTS IN ERROR.

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A party upon the record, although divested of all interest in the event of the suit, is not a competent witness in a cause.<sup>1</sup>

If a person be declared a bankrupt at a time when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. His liability for costs, therefore, excludes him as a witness upon the ground of interest.<sup>2</sup>

<sup>1</sup> CHANGED BY STATUTE. *Good v. Martin*, 5 Otto, 98; *United States v. Clark*, 6 Id., 44. And see *Pino v. Beckwith*, 1 New Mex., 27.

<sup>2</sup> The authorities upon the point here decided are not harmonious. The case of *Hoswell v. Thorogood*, cited by the court, was decided in the King's Bench in 1828. Tenterden, C. J., said: "The rules deducible from all the cases are laid down in Mr. Deacon's *Treatise on the Law of Bankruptcy*; and after stating the rules applicable to cases where the plaintiffs have obtained verdicts, and the defendants have become bankrupt before judgment, he says: 'With respect to costs upon a judgment of nonsuit, the statute (6 Geo. IV., c. 16) is wholly silent, making no provision whatever for the proof of a defendant's costs, whether on a judgment of nonsuit or judgment after verdict. It was, indeed, formerly determined that where the nonsuit was before the bankruptcy of the plaintiff, the costs might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be found only in two cases which were impugned by Lord Eldon in *Ex parte Hill*, 11 Ves., 646, and which were overruled in *Ex parte Charles*, 14 East., 197. And it has since been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed. *Walker v. Barnes*, 5 Taunt., 778.' That is, I think, a correct statement of the decisions upon the subject. Now, here the plaintiff becomes a bankrupt after the nonsuit, but before judgment was signed. The costs of the cause did not constitute any debt until judgment was signed, for there is no distinction in this respect between a case

where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defendant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker v. Barnes* is a decisive authority to show that the amount of these costs could not be proved as a debt under the plaintiff's commission; and if that be so, then he is liable to pay them. As to the costs of the reference, there can be no question. They clearly did not constitute a debt provable under the commission. The rule for the attachment for the non-payment of the costs of the cause and of the reference must, therefore, be made absolute."

In 1831 the same conclusion was reached in the Common Pleas Court. *Brough v. Adcock*, 7 Bing., 650. Where the debt arose before bankruptcy, but a verdict was obtained and costs taxed after, the costs were considered as a part of the original debt, and the certificate was held to extend to both, because both were provable. This was an early case. *Lewis v. Piercy*, 1 H. Bl., 59. If the verdict, as well as the judgment, is after the bankruptcy, the costs are not provable. *Ex parte Pouchier*, 1 Glyn & J., 385; and in this same case it was held if the verdict is obtained before the bankruptcy, but the judgment after, the costs are provable; but not, in an early case, in an action of tort for words spoken of the plaintiff in his trade, where the defendant becomes bankrupt between the verdict and judgment. *Longford v. Ellis*, 1 H. Bl., 20 (1788); *Aylett v. Harford*, 2 W. Bl., 1317 (1778); *Hurst v. Mead*, 5 T. R., 385; *Watts v. Hart*, 1 Bos. & P., 134; *Gulliver v. Drinkwater*, 2 T. R., 261; *Riley v. Byrne*, 2 Barn. & Ad., 779. Where an arbitrator made his award, and the defendant afterward committed an act of bankruptcy, when judgment was signed, and then the defendant was adjudged a bankrupt, it was held that

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If the event of the suit may increase the effects of the bankrupt in the hands of the assignee, and thus increase the surplus which would belong to him, he is an incompetent witness.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

On the 26th of September, 1840, Bridges, Mabray, & Co., gave their promissory note to Armour, Lake, & Walker, or order, payable one day after date, for \$3,158.69, being balance of book-account, bearing interest at eight per cent. per annum, from the 1st day of August, 1840, until paid.

The note not being paid, a suit was commenced on the 12th of November following. As no question arises upon the pleadings, it will be unnecessary to refer to them. They resulted in several issues of fact.

On the trial, in June term, 1844, the plaintiffs offered in

the judgment and costs were provable. *Thornthwaite, Ex parte*, 1 Bank & Ins. R., 264; s. c., 18 Jur., 760; 23 L. J., Bank, 22. A obtained a verdict against B, subject to reference to an arbitrator, who might award the verdict against either party, by agreement. B then became a bankrupt. It was held that the judgment rendered was provable against B. *Ex parte Harding*, 5 DeG. & G., 367. The case of *Hoswell v. Thorogood* is very much shaken by the case last cited, and by *Ex parte Ferris*, 2 Mont., D. & D., 746. s. c., 6 Jur., 1070; and by *Ex parte Cocks*, 11 Jur., 270; s. c., DeG., 466. Under the English bankruptcy act of 1869, costs are provable against the bankrupt's estate, although judgment is not rendered until after the adjudication. *Ex parte Peacock*; in *re Duffield*, L. R. 8 Ch., 628; 42 L. T., Bank, 78; 21 W. R., 755; 28 L. T. n. s., 830.

The decisions in the State courts are not altogether harmonious. In Massachusetts it is held that if judgment is obtained between the date of filing the petition in bankruptcy and the granting of the discharge, the bankrupt is liable for the amount of such judgment, and his discharge is no bar to it. *Bradford v. Rice*, 102 Mass., 472; *Woodbury v. Perkins*, 59 Mass., 86. The decision is put upon the ground that the judgment is a debt of a higher order than the debt it was founded upon, that it is in fact a new debt, one created after the peti-

tion in bankruptcy was filed, and therefore not barred by the discharge. They further hold that it was the duty of the bankrupt to have applied for a stay of proceedings in the suit until he obtained his discharge, and failing to do so, he is bound by the judgment. *Ellis v. Ham*, 28 Me., 385; *Thompson v. Hewitt*, 6 Hill (N. Y.), 254; *Kellog v. Schuyler*, 2 Den. (N. Y.), 73; *Holbrook v. Foss*, 27 Me., 441; *Uran v. Hondlette*, 36 Me., 15; *Pike v. McDonald*, 32 Me., 418; *Fisher v. Foss*, 30 Me., 459; *Roden v. Jacob*, 17 Ala., 344; *Ingersoll v. Rhoades*, 1 Hill & D. (N. Y.), 371; *Rees v. Butler*, 18 Mo., 173; *Leavitt v. Baldwin*, 4 Edw. (N. Y.), 289.

But in other States the discharge is held to be a release from the effect of the judgment; and the court will inquire into the original debt to see if it is one that would be barred by the discharge. *Harrington v. McNaughton*, 20 Vt., 283; *Dresser v. Brooks*, 3 Barb. (N. Y.), 429 (denying certain dicta in earlier cases); *Johnson v. Fitzhugh*, 3 Barb. (N. Y.) Ch., 360; *Clark v. Rowling*, 3 N. Y., 216; *Fox v. Woodruff*, 9 Barb. (N. Y.), 498; *McDonald v. Ingraham*, 30 Miss., 389; *Downer v. Rowell*, 26 Vt., 397; *Dick v. Powell*, 2 Swan (Tenn.), 632; *Stratton v. Perry*, 2 Tenn. Ch., p. 635; *Eberhardt v. Wood*, Id., 490; *Harris v. Vaughan*, Id., 486; *Lowry v. Hardwick*, 4 Humph. (Tenn.), 188; *Monroe v. Upton*, 50 N. Y., 593. See *Weeks v. Prescott*, 54 Vt., 318.

evidence the deposition of Walker, a coplaintiff on the record, taken in answer to interrogatories and cross-interrogatories before a commissioner in New Orleans, in pursuance of a stipulation between the attorneys; and in which the attorney for the defendants agreed to waive any exception for want of issuing a commission, in due form, to take the testimony, or for want of notice of its execution to the defendants.

It appeared on the trial that Walker had obtained a discharge under the bankrupt act, by which he was discharged from all his debts owing by him at the time of presenting his petition, to wit, on \*the 30th of December, 1842. The [\*92 discharge was granted on the 12th of May, 1843.

In one of the interrogatories in chief the question was put to the witness whether or not he had any interest in the event of the suit, and, if none, in what manner his interest had ceased. To which he answered, that he had none, and that his interest ceased on obtaining his discharge.

The counsel for the defendants objected to the admission of the deposition, on the ground that Walker was a party to the record, one of the plaintiffs in the suit; but the objection was overruled, and the evidence admitted, to which the counsel excepted. The plaintiffs had a verdict.

The cause was argued by *Mr. Coxe*, for the plaintiffs in error, and by *Mr. Chalmers*, for the defendants in error.

*Mr. Coxe* contended,—

1. That the deposition of Walker, then and still a party plaintiff on the record, was inadmissible.

2. That even if his discharge, under the bankrupt act, could make him a competent witness, it was necessary to establish that fact, as preliminary to the reading of his deposition, and by independent proof.

Walker's name is still upon the record, and he is one of the defendants in error in this court. The general rule upon the subject is clear, and the exceptions are few. The plaintiff in error must bring himself within one of the exceptions. 1 Pet., 596.

The case in 1 Pet., C. C., 307, was overruled by this court in 12 Pet., 145, where it is said that the circuit decision is not to be sustained upon any ground.

The only exception to the general rule is in cases of tort where there are several defendants. The court will direct one to be acquitted, if justice requires it, in order that he may be a witness. 10 Pick. (Mass.), 18; 4 Wend. (N. Y.), 109

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453; 1 Bay. (S. C.), 308; 10 Pick. (Mass.), 57; 2 Bay. (S. C.), 427. As to the extinguishment of his interest by the bankruptcy, see 10 Wheat., 367, 375, 384.

An insolvent party cannot be a witness, but a certificated bankrupt may, provided his name be struck out of the record. 9 Cranch (Mass.), 153, 158.

*Mr. Chalmers*, for defendants in error.

The only question presented upon the record in this case is the competency of Felix Walker, a party to the record, whose deposition had been taken upon interrogatories, by consent, after his discharge under the bankrupt act of Congress, of the 19th of August, 1841. The suit was commenced 20th of November, 1840, by Armour, Lake, & Walker (the witness) against plaintiffs in error; on the 12th of May, 1843, \*98] Walker was discharged; and on the 24th \*of May, 1843, his deposition was taken, which upon the trial plaintiffs in error objected to being read, upon the ground "that the said Felix Walker is a party to the record," which objection was overruled by the court, and the deposition was read; to which opinion of the court a bill of exception was taken, and upon it the case is before this court.

It will not be seriously urged that Walker, the witness, was incompetent on the ground of interest, he having received his discharge under the bankrupt act, by which his interest was extinguished and so far his competency restored. For whatever interest he may have had, it was extinguished when he was sworn, and could form no objection to his competency. 1 Phill. Ev., 133, by Cow. & Hill; *Tennant v. Strachan*, 4 Car. & P., 31; 1 Moo. & M., 377. Indeed, if it did, plaintiffs in error waived the objection by failing to make it when the deposition was taken,—it being known to them at the time. *United States v. One Case of Hair-pencils*, Paine, 400. So when a witness has been cross-examined by a party with a full knowledge of an objection to his competency, a court of equity will not allow the objection. *Flagg v. Mann*, 2 Sumn., 486. But the objection was to the competency of Walker as a party to the record.

It is a general rule in all common law courts, that a party on the record cannot be admitted to testify; the reason of this rule is the interest of the party called, and wherever that can be extinguished the rule ceases. In New York the rule, it seems, excludes the party without regard to the question of whether he be interested or not; but see *Stein v. Bowman*, 13 Pet., 209, 219; *Worrall v. Jones*, 7 Bing., 395; *Aftalo v. Fourdrinier*, 6 Id., 306; *Bate v. Russell*, 1 Moo. & M., 332;



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*Hart v. Heilner*, 3 Rawle (Pa.), 407; *Scott v. Lloyd*, 12 Pet., 145, 149; *Henderson v. Anderson*, 3 How., 73; *Smyth v. Strader*, 4 H., 404.

In the case of *Willings v. Consequa*, 1 Pet., C. C., 307, Washington, J., says "the general rule of law certainly is, that a party to a suit cannot be a competent witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed the objection ceases to exist." Mills, J., in *Lampton v. Lampton's Executors*, 6 Mon. (Ky.), 617, 618. Upon a full view of all the cases,<sup>1</sup> the counsel for defendants in error respectfully contends, that the District Court did not err in permitting the deposition of the party, Walker, to be read \*to the jury, upon the ground of interest, or [\*94 being a party, and that if incompetent for either cause the objection was waived by not having been made at the taking of the deposition.

Mr. Justice NELSON delivered the opinion of the court.

Whether a party on the record, divested of all interest in the result of the suit, and therefore unexceptionable on that ground, is a competent witness or not in the cause, can scarcely be regarded as an open question in this court, after what has already fallen from it.

It is true, as stated by the counsel in the argument, that in all the cases in which the question has arisen, the party was liable for the costs of suit, and therefore interested; but whenever the question has been presented, the language of the court has been uniform, that the witness was incompetent on the ground of his being a party on the record; *De Wolf v. Johnson*, 10 Wheat., 367, 384; *Scott v. Lloyd*, 12 Pet., 145; *Stein v. Bowman et al.*, 13 Id., 209.

In *Scott v. Lloyd* the court referred to a case in 1 Pet., C. C., 301, where it had been held, that a party named on the record might be made a competent witness, by a release of his interest, and expressed its unqualified dissent; and in *Stein v. Bowman et al.* (13 Pet., 209), in which Bowman, a party, had been admitted, the court, after noticing his liability

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<sup>1</sup> See those collected in 2 Phillips on Ev. by Cowen & Hill, notes, pages 134-138, 260-266; *Haswell v. Bussing*, 10 Johns. (N. Y.), 128; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.), 125, citing 3 Esp. & 3 Camp.; *Supervisors of Chenango v. Birdsall*, 4 Wend. (N. Y.), 453; *Duncan v. Watson*, 2 Sm. & M. (Miss.), 121; 1 Bing., 444; 6 Binn. (La.), 16; 4 N. Y., 24; 2 Day (Conn.), 404; 11 Mass., 527; 12 Id., 258; 16 Id., 118; 3 Harr. & M. (Va.), 152; 3 Stark. Ev. 1061, note g.

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for costs, remarked, that if he had been released, or a sum of money sufficient to cover the costs of suit brought into court, his competency would not have been restored.

The exclusion is placed on the ground of policy, which forbids a party from being a witness in his own cause, and that this would be the practical effect and operation of a rule of evidence, which would enable a party to qualify himself for a witness by releasing his interest in the suit. Though nominally discharged by the release, he would, usually, be the real and substantial party to the suit in feeling, if not in interest; thereby holding out to litigants temptations to perjury, and to the manufacturing of witnesses, in the administration of justice.

The question is one in respect to which different courts have entertained different opinions, and we admit that the argument in favor of the admission of the party, upon the general principles of evidence governing the competency of witnesses, is plausible, and not without force. But the tribunals which maintain the competency of the party, if divested of interest, still hold that he cannot be compelled to testify, and, also, that he cannot be compelled to testify when called against his interest; which, upon general principles, if consistently carried out and allowed to govern the question in the admission of the party, would lead them to an opposite result. They should be compelled to testify; for if the \*95] admission is \*placed, as it undoubtedly is, upon principles applicable to the admission and rejection of witnesses generally, in the cause, and the party to be regarded as competent when without interest, or indifferent, or when called against his interest, then, like all other witnesses, he should be subject to the writ of subpœna, and to the compulsory process of the court; and not left at liberty to withhold or bestow his testimony at will.

There can be no distinction in principle, in this respect, in favor of a party to the record, if allowed as a witness at all; and the only ground upon which the court can stop short of going the length indicated, is, by giving up general principles, and placing itself upon policy and expediency, as upon the whole best subserving, in the instances mentioned, the interests of justice, and of all concerned in its administration,—a ground which has been supposed, by those holding a different opinion upon the question, quite sufficient to justify the entire exclusion of the party.

But the witness in this case is also liable to objection on the ground of interest. This suit was pending at the time he was declared a bankrupt and obtained his discharge; and

it is quite clear, if the defendants had eventually succeeded, the discharge would not have been a bar to his liability for the costs of the suit. The judgment would have been a debt accruing subsequent to the discharge, which could not have been proved under the act. Act of Congress, August 19, 1841, § 4 (5 Stat. at L., 443); *Haswell v. Thorogood*, 7 Barn. & C., 705; *Brough v. Adcock*, 7 Bing., 650. His future effects, therefore, would have been liable.

And even if the discharge could have operated in bar of his liability for the costs, the witness was still interested to procure a recovery in favor of the plaintiffs, as it would to increase the effects of his estate in the hands of the assignee, to the extent of his interest in the demand in suit, and to increase the surplus, if any, which would belong to him.

For this reason, a defendant, who has pleaded his certificate, upon which a *nolle prosequi* has been entered, by the plaintiff, is not a competent witness for his codefendant, without first releasing his interest in this fund. He would otherwise be interested in defeating a recovery of the demand in suit, as he would thereby diminish the claims upon his joint and separate property, and thus increase the surplus, if any, in winding up the estate. *Butcher v. Forman*, 6 Hill (N. Y.), 583; *Aflalo v. Fourdrinier*, 6 Bing., 306.

On all these grounds we think the witness was incompetent, and that the deposition should have been rejected.

It has been suggested that the objection to the witness came too late, and should have been made before the commissioner and before the cross-examination. But the case shows that both parties were aware of the legal objections to his competency, and that the testimony was taken by an arrangement between them, for the \*purpose of pre- [\*96  
senting the question to the court. The counsel for the plaintiffs assumed, as is apparent from his interrogatories in chief, that the witness was incompetent on the ground of his being a party in interest, and took upon himself the burden of removing the objections. For this purpose, he produced his discharge in bankruptcy, and on the 14th inst., put the question to him whether he had any interest in the suit, and if not, to tell how it had ceased.

The question suggested does not arise in the case, and therefore it is unnecessary to examine it.

For the above reasons, we think the court below erred, and that the judgment must be reversed, with a *venire de novo*.

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Hall v. Smith.

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## ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said District Court, with directions to award a *venire facias de novo*.

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HENRY A. HALL, PLAINTIFF, v. WILLIAM SMITH.

Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor, is a payment at his request, and is an express assumpsit to reimburse the amount.

Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Maryland.

The United States of America, District of Maryland, to wit:—

At a Circuit Court of the United States for the Fourth Circuit, in and for the Maryland District, begun and held at the city of Baltimore, on the first Monday in April, in the year of our Lord one thousand eight hundred and forty-four.

Present, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States; the Honorable Upton S. Heath, Judge of Maryland District; Z. Collins Lee, Esquire, Attorney; Thomas B. Pottenger, Esquire, Marshall; Thomas Spicer, Clerk.

Among other, were the following proceedings, to wit:—

\*97] \*HENRY A. HALL v. WILLIAM SMITH.

District of Maryland, Circuit Court of the United States, April term, 1844.

The declaration in this case contained counts, in the usual form, for money lent and advanced, money paid, laid out, and expended, and money had and received, and an averment

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that the defendant was a citizen of the State of Mississippi, and the plaintiff of the State of Maryland. Plea, non-assumpsit, and issue upon it. The suit was instituted July 3d, 1843.

At the trial of the case, the plaintiff offered in evidence the two notes hereinafter inserted, with the indorsements thereon, and further offered in evidence to prove that the defendant being indebted to a certain Philip Thornton in the sum of money hereinafter mentioned, the said Thornton brought suit against him in Baltimore County Court, in the State of Maryland, on the 18th of July, 1839; while the writ was in the hands of the sheriff, and before the service thereof on the defendant, it was agreed between Smith and the attorney of Thornton, that Smith should be permitted on his honor to go into an adjoining county to see his friends, to procure security in order to relieve himself from said suit. He went and returned; and on the 29th of July, 1839, in the State aforesaid, gave two promissory notes to Thornton, dated August 10th, 1839, one for \$2,678.90, payable on the 1st of April, 1840, and the other for \$2,669, payable on the 1st of June, 1840; both of which notes were indorsed by a certain James S. McCaleb and a certain James Kent, as securities for the said Smith; and upon receiving these notes, so indorsed, Thornton discontinued the suit against Smith. These notes were not paid at maturity, and were protested for non-payment; and in June, 1840, Thornton brought suit on both of them against McCaleb, the indorser, in Baltimore County Court, upon which he, McCaleb, was arrested, and being in the hands of the sheriff, he applied to a certain Richard Lemmon, of the city of Baltimore, to become his bail. McCaleb was the son-in-law of Henry A. Hall, the plaintiff, who resides in the State of Maryland, about forty miles distant from the city of Baltimore, and Lemmon being an intimate friend of the said Hall, and knowing McCaleb to be his son-in-law, agreed to become his bail, from the confidence he had that the plaintiff would save him harmless; and he entered bail accordingly in both of these suits.

That at the first interview Lemmon afterwards had with the plaintiff, the latter introduced the subject, and without waiting for any application from Lemmon, assured him that he, the plaintiff, would save him harmless; and Lemmon having entire confidence in his verbal promise, did not ask any written security. Pending these suits Smith paid part of one of the notes, and before judgment was obtained upon either of them, Hall paid the balance of the last mentioned

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\*98] note, and upon an agreement made with the attorney of \*Thornton, a suit by *Philip Thornton v. Henry Hall*, the plaintiff, was docketed by consent on the 7th of September, 1840, in the Circuit Court of the United States for the district of Maryland, and on the declaration was indorsed a direction to the clerk to enter judgment for the amount of the damages in the narration, to be released on payment of \$2,669, with interest from the 1st of January, 1840, and costs, and stay of execution until the 1st of July, 1841; which was signed by the attorneys for the plaintiff and defendant. That, accordingly, at the next term of said court, in November, 1840, on the 4th day of the month, said judgment was entered, and the suits against McCaleb, in which Lemmon was bail, according to an arrangement between the counsel of Thornton, McCaleb, and Hall, were dismissed, having been countermanded on the 1st of September, 1840, in consequence of an agreement made between said parties, Thornton, McCaleb, and Hall, previous to said countermand, that said suit should be docketed by consent, and judgment confessed, as was afterwards done in the manner above stated.

The judgment was confessed in the Circuit Court, in order to create a lien upon the real estate of Hall, which being situated in a part of Maryland which was not within the jurisdiction of Baltimore County Court, it was supposed that a judgment in that court would not be a lien upon it.

Upon the confession of this judgment in the Circuit Court, the notes above mentioned were delivered to Hall by the attorney of Thornton; a part of this judgment was paid to the attorney of Thornton, by a draft of Smith in favor of McCaleb, upon a house in New Orleans, and the balance due upon it was paid by Hall on the 30th of June, 1841. James S. McCaleb died in the State of Mississippi, of which he was a citizen, in the summer of 1842, and letters of administration on his estate were afterwards, on the 28th day of November, in the year 1842, granted by the proper authority in that State to Jonathan McCaleb; and on the 20th of May, 1843, the administrator assigned to Hall, the plaintiff in this case, the notes aforesaid.

The notes, with the several indorsements and assignments thereon, are as follows, to wit:—

\$2,669

*Baltimore, August 10th, 1839.*

On the first day of January next, I promise to pay to the order of James S. McCaleb, twenty-six-hundred and sixty-

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nine dollars, for value received, payable and negotiable at the Union Bank of Maryland. WM. SMITH.

4th January, 1840.—J. G., *N. P.* Non-payment.

No. given.—H. & S.

Indorsements.—651. Wm. Smith, \$2,669. *January 1.*  
JAMES S. McCALEB,  
JAMES KENT.

\*In consideration that the amount of the within note, with interest thereon, was paid by Henry A. Hall, Esq., [\*99 in behalf of James S. McCaleb, deceased, the indorser thereon, now I do hereby assign to said Henry A. Hall, said note.

JONA. McCALEB, *Administrator of*  
May 20th, 1843. JAMES S. McCALEB, *deceased.*

\$2,678.90. *Baltimore, August 10th, 1839.*

On the first day of April next, I promise to pay to the order of James S. McCaleb, twenty-six hundred and seventy-eight dollars  $\frac{9}{10}$ , for value received, payable and negotiable at the Union Bank of Maryland. WM. SMITH.

April 1.—Prot. non payment, 4th April, 1840.

Indorsed.—Union, 583. Wm. Smith, \$2,678.90. *April 1.*  
JAS. S. McCALEB,  
JAMES KENT.

*Baltimore, July 13th, 1840.* \$1,500. By cash, received of Jas. S. McCaleb, on account, the within fifteen hundred dollars.

JNO. M. GORDON, *Attorney for*  
P. THORNTON.

\$400. *July 24th.*—By cash, \$400. JOHN M. GORDON.

\$200. By cash, two hundred dollars. *August 3d, 1840.*  
J. M. GORDON.

I assign the within note to Henry A. Hall, for value received.

JONATHAN McCALEB, *Administrator of*  
May 20th, 1843. JAMES S. McCALEB.

The defendant offered to give in evidence that Smith and McCaleb, the drawer and payee of the two notes given to Thornton, were citizens of the State of Mississippi at the date of the notes, and that McCaleb continued to be so until his death, and that Smith still continues to be so.

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Upon this evidence the following questions occurred:—

1. Is the plaintiff entitled to recover of the defendant the money paid by plaintiff to Thornton, or any part of it, as being money paid for his (Smith's) use?

2. If the first question is answered in the negative, then can the defendant, upon the issue joined in this case, offer evidence that Smith and McCaleb were both citizens of Mississippi when the notes stated in the testimony were given in order to bar the plaintiff of his action in this court as assignee of said notes?

And the judges being opposed in opinion upon each of these points, they are, at the request of the plaintiff, ordered to be certified to the Supreme Court at their next session.

Upon this certificate the case came up to this court.

\*100] \*It was argued by *Mr. Dulany*, for the plaintiff, and by *Mr. Giles* and *Mr. David Stewart*, for the defendant.

*Mr. Dulany.*

As to the first question presented by the record, it cannot be denied that the money paid by Hall to Thornton was expended for the benefit of the defendant, Smith. It went "*pro tanto*" to extinguish the debt due by Smith to Thornton; it was money, therefore, advanced for the use of Smith, and of which, in fact, he obtained the full benefit. What reason then can be alleged why an action for money laid out and expended for the use of Smith cannot lie to recover it again on the part of Hall? The Circuit Court has jurisdiction over the subject-matter of such a suit, and over the parties; for Hall is a citizen of the State of Maryland, and Smith of the State of Mississippi.

But it is alleged that Smith became indebted to James S. McCaleb, on his, Smith's, failure to pay the two promissory notes, on each of which notes said McCaleb was indorser; that Smith and McCaleb were citizens of the same State; that, as such, McCaleb could not have sued Smith in the courts of the United States; and that, by the assignment of the notes to Hall, he was placed in the shoes of McCaleb, and could no more appear in the courts of the United States as plaintiff, to enforce payment of the notes against Smith, than McCaleb himself could have appeared for that purpose.

The principle that the Circuit Court of the United States has not jurisdiction, on account of the character of the parties, in a contest between citizens of different States, where the cause of action arises upon a debt assigned, and originally contracted between citizens of the same State, is fully admitted. But its application to the present case is denied.



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It is admitted that, when the assignor could not sue there, in an action on the debt assigned, the assignee is in no better situation than the assignor, although he may be a citizen of a different State from the original debtor.

In the case now under consideration the action is not instituted upon the notes assigned, but for money expended for the use of Smith, and upon his implied request. The money expended, which is the cause of action, was paid on the 30th of June, 1841. The notes were not assigned until the 20th of May, 1843. The cause of action, then, under the money counts of the declaration, arose long anterior to the assignments, and subsisted wholly independent of them; the notes, with the assignments upon them, being introduced in evidence to show in what manner the money paid by Hall inured to the benefit of Smith, and were therefore collateral to the true cause of action, and designed merely as links in the chain of evidence to support it.

The declaration shows that the suit is between citizens of different States, and clearly therefore within the general jurisdiction of the Circuit Court, unless it falls [\*101 within the restrictive clause of the eleventh section of the judiciary act of 1789, ch. 20, which declares, that the Circuit Court shall not "have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in said court to recover the said contents if no assignment had been made."

In *Bean v. Smith and others*, 2 Mason, 279, it is said, speaking of the above clause,—“It is perfectly clear that the statute never contemplated an exclusion of jurisdiction in cases where a negotiable instrument or chose in action was mixed up in the ingredients of the case; but where that chose in action constituted the *sole* cause of action, and the assignment the *whole* ground of the plaintiff's right.”

In the present case it is manifest that the assignment of the notes does not constitute the whole ground of the plaintiff's action; but, on the contrary, that the cause of action subsisted independent of, and anterior to, the assignments, and at and from the moment when the money was paid by the plaintiff to the attorney of Thornton, in discharge *pro tanto* of his claim against Smith. If this be so, then it is clear that the restrictive clause of the judiciary act, above quoted, does not exclude the jurisdiction of the Circuit Court over the parties and the subject-matter of this cause.

But it may be replied, that if the money advanced by Hall is regarded as the true cause of action, and not the assigned

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notes, then the plaintiff is not entitled to recover; because the debt of Smith, to which the money was applied, was paid without his request or consent, and was therefore a mere voluntary act, from which no cause of action can arise against him.

A consideration of the evidence in this case, and the relation of the parties, will, we think, show that this objection cannot be sustained. Smith was the drawer of both of the notes in favor of James S. McCaleb, who became the accommodation indorser, and who redelivered them to Smith, who, from his own accommodation, and to relieve himself from a threatened arrest, gave them to Thornton, to whom he was indebted, and at whose instance the writ against Smith had been issued. These notes were not paid at maturity, as they should have been, by Smith; in consequence of whose default writs were issued out of Baltimore County Court against James S. McCaleb, as indorser, under which he was arrested by the sheriff, and whilst in the hands of that officer applied to Mr. Lemmon to become his bail, who consented to do so, in the confidence that he would be indemnified by the plaintiff, who was the father-in-law of the said McCaleb. Lemmon accordingly became bail for McCaleb, who was then released by the sheriff.

Afterwards, at the first interview Lemmon had with the plaintiff, \*he assured him that he, the plaintiff, would  
 \*102] save him harmless for having gone bail for his son-in-law. Pending these suits Smith had paid part of one of the notes; and before judgment was obtained upon either of them Hall paid the balance of the other note. Suit was then docketed against Hall in the Circuit Court by Thornton, and judgment was confessed, to be released on payment of \$2,669, with the interest from the 1st of January, 1840. The payment of the balance of the note by Hall, and the confession of the judgment aforesaid, was the fulfilment, on the part of Hall, of his agreement with Lemmon to save him harmless for having gone bail for McCaleb; the suits against him in Baltimore County Court being dismissed, upon the confession of the judgment by Hall in the Circuit Court, as had been previously agreed between the attorney of Thornton and Hall. At the same time that the judgment was confessed the notes above mentioned were delivered to Hall by the attorney of Thornton.

The argument upon the second question is omitted.

*Mr. Stewart and Mr. Giles* made the following points:—

1. That the plaintiff cannot recover of the defendant the

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amount of the payments so made, because, in making them, the plaintiff was a mere volunteer so far as the defendant was concerned.

2. That the plaintiff cannot recover upon the promissory notes referred to, because he claims title through an assignment made by Jonathan McCaleb, administrator of James S. McCaleb, the payee of the said notes, both of whom were citizens of the State of Mississippi, of which State the defendant was also a citizen.

3. That it was perfectly competent for the defendant, after the plaintiff had given the promissory notes in evidence under the declaration in this case, to rely under his plea, filed upon the defect of title in the plaintiff as assignee of the said notes, to recover in the Circuit Court.

Mr. Justice WAYNE delivered the opinion of the court.

Upon the trial of this cause in the Circuit Court, two points were made, upon which the judges differed in opinion; and it has been certified to this court, as is provided for in the sixth section of the act of 1802, entitled "An act to amend the judicial system of the United States." 2 Stat. at L., 159. From the evidence, we think that all the persons in this transaction became privies in the same contract to secure the payment of a debt due by the defendant to Thornton. The payment of it, therefore, by any one of them, other than the debtor, was a payment at his request, and an express assumpsit to reimburse the amount.

But suppose such a privity not existing between the parties, the evidence shows it also to be a case of the surety of a surety paying the debt of a principal, under a legal obligation, from which the \*principal was bound to relieve [\*103 him. Such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, though the payment was made without a request from the principal. *Tappin v. Broster*, 1 Car. & P., 112; *Exall v. Partridge*, 8 T. R., 310; *Child v. Morley*, Id., 610.

We shall decide the first point certified to be answered in the affirmative, which makes it unnecessary to notice the second.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Maryland, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion

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agreeably to the acts of Congress in such case made and provided, and was argued by counsel. In consideration whereof, it is the opinion of this court that the plaintiff in this case is entitled to recover of the defendant the money paid by the plaintiff to Thornton, as being money paid for his (Smith's) use. Whereupon it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

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JOHN A. BARRY, PLAINTIFF IN ERROR, v. MARY MERCEIN  
AND ELIZA ANN BARRY.

This court has no appellate power, in a case where the Circuit Court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother.<sup>1</sup>

The judgments of a Circuit Court can be reviewed only when the matter in dispute exceeds the sum or value of two thousand dollars. It must have a known and certain value which can be proved and calculated in the ordinary mode of business transactions.<sup>2</sup>

But a controversy between a father and mother, each claiming the right to the custody, care, and society of their child, relates to a matter in dispute which is incapable of being reduced to any pecuniary standard of value.<sup>3</sup>

The writ of error must be dismissed for want of jurisdiction.

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<sup>1</sup> The ruling in this case has been changed by statute, and an appeal now lies to the Supreme Court from the Circuit Court. Act of Feb. 5, 1867, 14 Stat. at L., 385; Rev. Stat., §§ 763, 764; *Ex parte McCordle*, 6 Wall., 818.

<sup>2</sup> APPLIED. *Youngston Bank v. Hughes*, 16 Otto, 524. FOLLOWED. *Potts v. Chumaseo*, 2 Otto, 361. CITED. *Ex parte Vallandigham*, 1 Wall., 251; *Elgin v. Marshall*, 16 Otto, 580.

"To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy,—to the matter in dispute when the action was instituted. The descriptive words of the law point emphatically to this criterion; and, in common understanding, the thing demanded (as in the present instance, the penalty of a bond) and not the thing found, constitutes the matter in dispute between the parties." *Wilson v. Daniel*, 3 Dall., 404. Affidavits may be filed to ascertain the amount in controversy. *Course v. Stead*, 4 Dall., 22; *United States v. McDowell*, Id., 22; *Rock v.*

*Parker*, 5 Cranch, 387; *Hogan v. Foison*, 10 Pet., 160.

When judgment is for the defendant, and the plaintiff appeals, the amount in controversy is the amount of the demand in the plaintiff's declaration. *Cooke v. Woodrow*, 5 Cranch, 13; *Pratt v. Law*, 9 Id., 457; *Gordon v. Ogden*, 3 Pet., 33; *Knapp v. Banks*, 2 How., 73.

But the defendant cannot avail himself of the amount of the demand; to thus give the court jurisdiction. *Ex parte Bradstreet*, 7 Pet., 634.

The Supreme Court will not take jurisdiction of a case, although the whole property claimed by the lessor of the plaintiff in error, under a patent, and which was recovered in ejectment, exceeded \$2,000, where the title to a lot of ground, part of the whole tract, which was of less value than \$500, was only involved in the case before the court. *Grant v. McKee*, 1 Pet., 248.

<sup>3</sup> FOLLOWED. *De Kraft v. Barney*, 2 Black, 704, 714. And see *Rogers v. Kennard*, 54 Tex., 38.

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THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The facts are sufficiently set forth in the opinion of the court, to which the reader is referred.

A motion was made by the counsel for the defendants in error, viz. *Mr. William W. Campbell* and *Mr. Rockwell*, to dismiss the case for want of jurisdiction, which motion was opposed by *Mr. Barry*, in proper person.

*Mr. Campbell*, for the motion.

In the summer of 1844, John A. Barry, the plaintiff in error, \*presented his petition to the Circuit Court for [ \*104 the Southern District of New York, praying that a writ of *habeas corpus ad subjiciendum* might issue, directing Eliza Ann Barry, the wife of petitioner, and Mary Mercein, her mother, to bring up the person of an infant child, the daughter of the petitioner and the said Eliza Ann, his wife, and which infant daughter was in the custody of the said Mary Mercein and Eliza Ann Barry. Previous to this period, and for more than five years, a controversy had been going forward in the courts of New York, prosecuted by the petitioner, for the purpose of obtaining the custody of this same child. Three or four times writs of *habeas corpus* had been granted by the local courts of that State, and indeed in one form or another all the courts, both of common law and of equity, had passed upon this vexed and protracted litigation. Twice had the court of last resort, the Court of Errors, after solemn and able arguments, passed upon the case, and refused to grant the application of the petitioner. The relatives of Mrs. Barry were wearied in mind, and exhausted almost of resources, by the long, persevering, and vexatious proceedings of the plaintiff in error in this cause.

Prior, however, to the application to the Circuit Court for the Southern District of New York, the plaintiff in error applied to this court for a writ of *habeas corpus*, which was refused. I shall have occasion to refer to these decisions hereafter.

In his application to the Circuit Court, in order to bring himself within the provisions of the constitution and laws of the United States, the petitioner sets forth that he is a natural born subject of the queen of Great Britain, and claims that the said infant child, though born in the State of New York, of a mother who is a native of that State, is also a British subject and allegiant to the British crown.

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After a patient hearing and a careful investigation of the law and the facts, Judge Betts refused to allow the writ, and he gave his reasons in an opinion of great length, in which he enters upon a review of the whole law upon the subject. I feel that there is nothing to be added to that opinion. It is able, lucid, and it seems to me entirely conclusive. While it is in the highest degree creditable to him as a judge of the courts of the United States, it is at the same time a masterly vindication of the decisions and the learning of the courts of New York.

He closes that opinion by saying,—

“I deny the writ of *habeas corpus* prayed for, because:—

“1. If granted, and a return was made admitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common law functions of *parens patriæ* and has no common law jurisdiction over the matter.

“2. Because the court has not judicial cognizance of the matter by virtue of any statute of the United States.

\*[105] “3. If such jurisdiction is to be implied, that then the decision of the Court of Errors of New York supplies the rule of law or furnishes the highest evidence of the common law rule which is to be the rule of decision in the case.

“4. Because by that rule the father is not entitled on the case made by this petition to take this child out of the custody of its mother.”

It is this decision which the plaintiff in error seeks to reverse, and on this motion to grant this writ of error it is respectfully submitted,—

1. That this is not such a final judgment as is contemplated by the statute of 1789, which a writ of error may be brought to reverse.

2. That there is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascertained so as to allow a court of error to bring up the matter to this court from the Circuit Court.

3. That the application was to the discretion of the Circuit Court, and this court will never interfere to control the discretion of the inferior court. The parties who are proceeded against are the wife and mother of plaintiff in error. The plaintiff in error cannot proceed against his wife in this court, her domicil in the eye of the law being the same as her husband's.

5. The Circuit Court possess no other or different powers in relation to *habeas corpus* under the act, than are possessed

by this court, and this court have already passed upon this case by refusing to grant the writ when application was made upon the same state of facts directly to this court. This court have no jurisdiction over the subject-matter, and the writ of error should be quashed for want of jurisdiction.

1. This is not such a final judgment as is contemplated by the statute.

The language of the statute, § 22, is that final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, may be reëxamined and rendered or affirmed in a Circuit Court holden in the same district upon a writ of error whereto shall be annexed and returned therewith at the day and place thereby mentioned an authenticated transcript of the record, assignment of errors, prayer for reversal, citation, &c.

"And upon a like process" (that is, writ of error, record, &c.), may final judgments, and decrees in civil actions, and suits in equity in a Circuit Court, brought there by original process or removed there from State courts, or by appeal from District Courts, &c., and "when the matter in dispute exceeds the sum or value of two thousand dollars," &c., be reëxamined and reversed or affirmed by the Supreme Court.

\*Now it is respectfully but confidently submitted [\*106 to this court that the decision of the Circuit Court in this matter, upon an *ex parte* application and where no summons or other process was served upon the defendants in error, or either of them, is not a final judgment in a civil action, or a final decree in a suit in equity.

It is stated that the petition was filed; but it was not served, nor was any original process issued or served; there were, therefore, no parties before the court, there was no action *in personam* or *in rem*, there cannot well be an action at law or a suit in equity where there are no parties before the court.

The act of March 3d, 1803, uses the expression, "cases in equity," but they are confined to cases of admiralty and maritime jurisdiction, and to be carried up to the Supreme Court by appeal.

Judge Betts says, in this case,—"*A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties.*" *Holmes v. Jennison et al.*, 14 Pet., 540, refused to discharge under *habeas corpus*. If a suit not a suit between private parties.

2. There is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascer-

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tained. Now by the twenty-second section of the judiciary act, to which I have referred, a writ of error to this court does not lie unless the matter in controversy, exclusive of costs, exceeds the sum of two thousand dollars. Now, though in some cases, the court have allowed testimony of value to be given by affidavits or *vivâ voce*, when the demand is not for money, yet this appears to have been done only in cases where real value could be readily fixed, and it has allowed the value of an office or its emoluments to be thus established.

I do not see how the value is to be ascertained in this case; and, indeed, it does not seem to be one of the actions at law or suits in equity contemplated by the act to reverse the judgment or decree in which writs of error may be brought.

In the case of *Columbian Insurance Company v. Wheelwright and others*, 7 Wheat., 534, a writ of error was held to lie for this court to the Circuit Court for the District of Columbia, upon a judgment overruling a peremptory mandamus. But it was quashed on account of the matter in controversy not being of the value of one thousand dollars, though in that case the value of the office was allowed to be appraised. But the language of the act of February 27, 1801, is different from that of the act of 1789.

In the act of 1801, writs of error may be brought to reverse or affirm final judgments, orders, or decrees in said Circuit Court. But, as in the act of 1789, final judgments in civil actions and suits in equity. Act of 27 February, 1801, § 8 (2 Stat. at L., 106), contains the provision in relation to writs of error to Circuit Court for the District of Columbia.

\*3. The application was to the discretion of the \*107] Circuit Court, and this court will not interfere to control the discretion of an inferior court.

It has been repeatedly decided in this court that the exercise of the discretion of the court below in refusing or granting amendments of pleadings on motions for new trials, and refusing to reinstate cases after nonsuit, affords no ground for writ of error. See *United States v. Buford*, 3 Pet., 31; *United States v. Evans*, 5 Cranch, 280; *Maryland Insurance Co. v. Hodgson*, 6 Id., 206.

See also the case of *Boyle v. Zacharie*, 6. Pet., 657, where the object of the writ of error was to reverse the decision of the Circuit Court in refusing to quash a writ of *venditioni exponas*, and where it was held not to lie. In that case, Mr. Justice Story said,—“A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a



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court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient."

The case before the court is one of a similar character, and resting equally in the sound discretion of the Circuit Court.

4. The plaintiff in error cannot proceed in this court against his wife; her domicil being in law the same as his. If the proceeding in the Circuit Court can be annulled as an action at law or a suit in equity, then clearly the plaintiff in error could not carry on such action or suit in any of the courts of the United States against his wife, as one of the defendants.

5. The Circuit Court possesses no other or different power than this court in relation to a writ of *habeas corpus*, and this court have already passed upon this case and refused the writ for want of jurisdiction. The writ of error should therefore be quashed for want of jurisdiction.

The language of the fourteenth section is, "that all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*," &c. The power of this court to issue writs of *habeas corpus* has never been doubted by the court and has repeatedly been exercised; but its power to issue a writ in the present case has been doubted and the writ refused. The court, after hearing the plaintiff in error on original application to this court on the same state of facts as were presented to the Circuit Court, refused to grant the writ. It is respectfully submitted that the application to a Circuit Court has in no respect changed the aspect of the matter, and if this court had no jurisdiction over the subject-matter when the original petition was presented, neither can it have jurisdiction now, when the subject comes up for its decision from the judgment of an inferior court.

In the case of *Ex parte Barry*, 2 How., 65, Mr. Justice Story says:—"It is plain, therefore, that this court has no original \*jurisdiction to entertain the present petition, and we cannot issue any writ of *habeas corpus*, except [\*108 when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution and laws of the United States."

Is it not equally plain that the Circuit Court can issue no writ of *habeas corpus*, except when it is necessary for the exercise of its jurisdiction, original or appellate, given to it by the constitution and laws of the United States? Was this *habeas corpus* necessary to the exercise of the jurisdiction of the Circuit Court? True, the eleventh section of the judicial act gives the Circuit Court original cognizance with the

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courts of the several States, of all suits of a civil nature at common law or in equity.

But "a procedure by *habeas corpus* (says Judge Betts) can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of sovereign, to ascertain whether the infant in this case is wrongfully detained, and in a way conducing to its prejudice."

It has been well and often remarked, that the power of the courts of the United States is given to them by express and written grant; and where they exercise the power of issuing writs of *habeas corpus*, they find their authority in "thus it is written." They derive no jurisdiction from the common law. The grand inquisition of the sovereignty of the United States is not to be invoked unless in cases where the written law gives the power to invoke it. Certainly, this is not one of the cases. It is a case for the grand inquisition of the State of New York. That grand inquest has repeatedly decided this matter.

"What question (says Judge Betts in this same opinion) can be regarded as in principle more local or intro-territorial than those which pertain to the domestic institutions of a State,—the social and domestic relations of its citizens? Or, what could probably be less within the meaning of Congress than that, in regard to these interesting matters, the courts of the United States should be empowered to introduce rules or principles, because found in the ancient common law, which should trample down and abrogate the policy and cherished usages of a State, authenticated and sanctified as a part of her laws by the judgment of her highest tribunals."

I submit this question of jurisdiction, with entire confidence, to this court. I know its practice has been in conformity with the language of its late eminent chief justice.

"We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it."

I submit, therefore, with great deference, the motion that this writ of error should be quashed, as irregular, and for want of jurisdiction.

\*109] *Mr. Barry*, in opposition to the motion, made the following points, which he maintained at great length.

1. The record in the above cause presents the case of a "final judgment" by the Circuit Court for the Southern

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District of New York in a "suit," within the meaning of the twenty-second section of the judiciary act of 1789; and the plaintiff in error is therefore entitled to have such judgment reëxamined in this court by writ of error, provided the court below had jurisdiction of the case, authority to issue the writ of *habeas corpus ad subjiciendum*, and the record presents a *prima facie* case for the award of such writ. United States Laws, Stat. at L., 81; *Holmes v. Jennison*, 14 Pet., 540; *Weston et al. v. City Council of Charleston*, 2 Id., 449; *Kendall v. United States*, 12 Id., 614; Sto. Com. Abr., 608; *Columbian Ins. Co. v. Wheelwright and others*, 7 Wheat., 534; Co. Litt., 288, b.

2. The court below had jurisdiction of this case, and authority to issue the writ of *habeas corpus* under the Constitution, at the common law, by implication, and by statute; and consequently committed error in deciding that it had not such jurisdiction and authority. The petition on the record presents a *prima facie* case for the award of such writ, and the court below committed error in denying it to the plaintiff in error, to whom it belonged as a writ of right by the "law of the land"; his title resting, in *debito justitiæ*, on probable cause shown by affidavit; 36 Edw. 3, cap. 9; 42 Edw. 3; 8 Henry 4; 8 Henry 6; 28 Edw. 1; 3 Car. 1; 16 Car. 1, cap. 10; 31 Car. 2; Bac. Abr. Title *Hab. Corp.*; *Greenhill's case*, 4 Ad. & E., Eng. Com. L., 624; *United States v. Green*, 3 Mason, 482; *Rex v. Winton*, 5 T. R., 89; *Rex v. Isley*, 5 Ad. & E., 441; Constitution United States; *Yates's case*, 6 Johns. (N. Y.), 422, 423; Bollman & Swartwout, 4 Cranch, 75; *Ex parte Randolph*, 2 Brock., 447; 3 Bl. Com., 182; 3 Bac. Abr., 421; Judiciary Act, 1789, § 14; United States Stat., 2 Mar., 1831, § 38; *Kearney's case*, 7 Wheat., 38; *Crosby's case*, 3 Wils., 172; 1 Kent Com., 301; *Wood's case*, 3 Wils.; 3 Bac. Abr. (3); *In re Pearson*, 4 Moo., 366; Mag. Char., cap. 29; *United States v. Bainbridge*, 1 Mason, 71; 1 Kent Com., 220; United States Supreme Court, *Ex parte Barry*, 2 How., 65; 19 Wend. (N. Y.), 16, and cases cited; *Vernon v. Vernon*, MS. case, New York Chancery, 11th June, 1839; *Ahrenfeldt's case*, Ch. New York, July, 1840; *Commonwealth v. Briggs*, 16 Pick. (Mass.), 204; *In re Mitchell*, Charlt., 489; *State of South Carolina v. Nelson*, MS. case, 1840; *Prather's case*, 4 Dessau (S. C.), 33; 25 Wend. (N. Y.), 72, 73; Gov. Seward's Mess. to Senate, Albany, 20th March, 1840; 5 East, 221; 12 Ves., 492; 2 Russ., 1; Review of *D'Hauteville's case*, 30; 2 and 3 Victoria, cap. 54; 11 Ves., 531; *People v. Mercein*, 3 Hill (N. Y.), 399; *Ex parte Burford*, 3 Cranch, 449.

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\*110] \*8. The court below, if it had jurisdiction by implication, committed error in assuming that the court for the correction of errors, by its decisions on the case of the plaintiff on two former writs of *habeas corpus*, in 1840 and 1842, had either "supplied the rule of law," or given "evidence of the common law rule" which was to be the rule of decision in the case on this record, two years after,—a case entirely *de novo*,—in 1844. And the court below committed further error in deciding, that by such assumed rule of law or evidence of the common law rule, the plaintiff in this cause was not entitled, on the case made by him, to the custody of his child,—the same being a prejudication on the merits,—no argument being had before the court in respect of either such assumed rule, or the evidence thereof, or on the merits. No such rule existed in point of fact, and consequently no evidence thereof could exist; decision Supreme Court New York, 1842, 3 Hill (N. Y.), 399; MS. Opinion, Chan. New York, April, 1844.

4. The plaintiff in error being of allegiance to the crown of England, his child, though born in the United States during its father's temporary residence therein,—twenty-two months and twenty days,—notwithstanding its mother be an American citizen, is not a citizen of the United States. It is incapacitated by its infancy from making any present election, follows the allegiance of its father, *partus sequitur patrem*, and is a British subject. The father being domiciled and resident within the dominions of her Britannic Majesty, such is also the proper and rightful domicile of his wife and child, and he has a legal right to remove them thither. The child being detained from the father, its natural guardian and protector, without authority of law, the writ of *habeas corpus ad subjiciendum* is his appropriate legal remedy for its restoration to him from its present illegal detention and restraint; Constitution United States, art. 3, § 2; Judiciary Act, 1789, § 11; *Inglis v. Trustees Sail. Snug Harb.*, 3 Pet., 99; 7 Anne, cap. 5; 4 Geo. 3, cap. 21; *Warrender v. Warrender*, 2 Cl. & F., 528; Story Conf. L., 30, 36, 43, 74, 160; Shelf. Marriage, Ferg., 897, 898.

5. If the laws of the proper domicile of the plaintiff (and by necessary consequence that of his family), applicable to the case on the record, be not repugnant to the laws or policy of this country, and this be proved to the court, the case is one proper for the exercise of the comity of the American nation,—not of the court, but of the nation; and the court below will extend that comity to the plaintiff, not only by awarding him the writ of *habeas corpus ad subjiciendum*, the

appropriate legal remedy sought, but also by deciding the case on its merits, at the hearing, agreeably to the law of his domicile; *In re Wilkes*, 1 Ken., 279; *Dartmouth College v. Woodward*, Con. Rep. United States, 577; *Warrender v. Warrender*, 2 C. & F., 529; 9 Bligh., N.S., 110; \*Bill for Protection of Minors, Senate of New York, 1840; [\*111 Gov. Seward's Message to Senate, 20th March, 1840.

*Mr. Rockwell*, for the motion to dismiss, in reply and conclusion.

1. The writ of *habeas corpus* is not issued as a matter of course, upon the application, but is addressed to the discretion of the court, and may be refused if upon the application itself it appears that, if admitted to be true, the applicant is not entitled to relief. 2 Bl. Com., 132, 133, n. (16); 3 Bulstr., 27; 2 Roll., 138.

*King v. Hobhouse*, 2 Chit., 207, marg. note.—“The writ of *habeas corpus*, whether at common law or under the 3 Car. 2, does not issue as a matter of course in the first instance, upon application, but must be grounded on affidavit, upon which the court are to exercise their discretion whether the suit shall issue or not.”

See also *The Spanish Sailors*, 2 W. Bl., 1324.

*King v. Barnard Schiever*, 2 Burr., 765.—*Habeas corpus* for a prisoner of war taken on board an enemy's prize-ship denied in the first instance.

*Ex parte Kearney*, 7 Wheat. 38.—In this case the application was *ex parte*, and in the first instance denied by the court, and in subsequent cases.

*Commonwealth v. Robinson*, 1 Serg. & R. (Pa.), 353.—The court declared it a matter of discretion whether to grant or refuse a writ of *habeas corpus* to discharge an apprentice from military service on application of the master.

*Ex parte Tobias Watkins*, 3 Pet., 193.—Petition denied in the first instance.

2. A writ of error does not lie to review the decision of a court, except upon final judgment, and the order of a court, denying in the first instance an *ex parte* application for a writ of *habeas corpus*, cannot be reviewed by writ of error.

*The People v. President of Brooklyn*, 13 Wend. (N. Y.), 130, Court of Errors Mandamus, marg. note.—“A writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory mandamus when application is made by motion. It only lies for the relator when judgment is pronounced after issue joined upon plea or demurrer interposed

upon the coming in of the return of the alternative mandamus."

*Boyle v. Zacharie et al.*, 6 Pet., 648, marg. note.—"A writ of error will not lie to a Circuit Court of the United States, to revise its decision in refusing to grant a writ of *renditioni exponas*, issued on a judgment obtained in that court."

*Per Story, J.* (p. 657).—"A very strong case, illustrating the general doctrine, is, that error will not lie to the refusal of a court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient." 3 Bro. P. C., 505.

\*The Dean and Chapter of *Dublin v. King*, 1 Bro. \*112] P. C., 73.—Application to the King's Bench for mandamus to admit Robert Dugale to his office as clerk, upon which there was an award of a peremptory mandamus; held writ of error not to lie, there being no plea and judgment.

*Weston v. City Council of Charleston*, 2 Pet., 449.

*Holmes v. Jennison*, 14 Pet., 540.—"I do not intend to examine the question whether proceeding upon a *habeas corpus* is a 'suit,' within the meaning of the twenty-fifth section; or whether writ of error will lie to review proceedings upon a *habeas corpus*, although the case on these points is not free from doubts," &c. *Per Thompson, J.*, 550; Judge Baldwin's opinion, 622, 625.

*Columbian Insurance Co. v. Wheelwright*, 7 Wheat., 534. Mandamus valuation of office.

II. The Circuit Court had no jurisdiction of the subject matter.

1. That court derives all its jurisdiction from the constitution of the United States and the acts of Congress, and is strictly confined to the acts of Congress conferring jurisdiction, and defining the powers of the court.

1 Kent Com., 294.—"With judicial power, it may be generally observed, as the Supreme Court declared in the case of *Turner v. Bank of North America*, 4 Dall., 8, that the disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the constitution might warrant."

*McIntyre v. Wood*, 7 Cranch, 504, to the same effect; *United States v. More*, 3 Id., 159; 6 Id., 305; 3 Dall., 321; 1 Cranch, 212.

*Mr. Barry.* The Circuit Court must enlarge their jurisdiction, as the Circuit Court has the residuum of authority inherent, and incidental powers at common law as a high court of record.

2. The only power conferred on the Circuit Court is in the judicial act of 1789:—

§ 14. “That all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

“And that either of them, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of inquiring into the cause of commitment.

“Provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless when they are in custody under or by order of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”

\*1. This statute provides that “all the beforementioned courts,” &c., referring to the Supreme, Circuit, [\*113 and District Courts, and conferring like powers on all. The original jurisdiction of all these courts, and the appellate jurisdiction of the Supreme and Circuit Courts had been all defined. The court derives all its power from this statute, and the limitations of it are to be precisely followed, *expressio unius exclusio est alterius*.

*Ex parte Ballard*; *Ex parte Swartwout*, 4 Cranch, 75, per Marshall, Ch. J., 93.—“Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, but the courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend their jurisdiction.”

“The power to award the writ by any of the courts of the United States must be given by written law.”

Page 95.—“If the power be denied to this court, it is denied to every other court of the United States.”

*Ex parte Tobias Watkins*, 3 Pet., 193, by Marshall, Ch. J., p. 201.—“The judicial act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment.”

*Ex parte Barry*, 2 How., 65, marg. note.—“The original jurisdiction of this court does not extend to the case of a petition by a private individual for a *habeas corpus* to bring

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up the body of his infant daughter, alleged to be unlawfully obtained from him."

Why not? If not conferred on the Supreme Court it is not conferred on the Circuit or District Courts by this statute.

2. The object of this section was not to confer upon any of these courts a general authority to issue this writ. It was designed as auxiliary,—“Which may be necessary for the exercise of their respective jurisdictions.”

The *scire facias* is a writ of execution, in all cases founded upon a record, and is a necessary incidental power to the exercise of the jurisdiction of any court. So of *habeas corpus*, without which power the court would not be able even to protect suitors or witnesses attending court from a writ, &c., &c.

3. That part of the section conferring the power upon the judges in vacation to issue the writ “for the purpose of inquiring into the cause of commitment,” as does the proviso, indicates that reference was only had to confinement under a United States process, or “under color of authority of the United States.”

31 Car. 1, ch. 2, provides,—“That on complaint and request in writing by or on behalf of any person committed and charged with any crime, (unless,” &c.), “the chancellor, &c., shall award a writ of *habeas corpus*,” &c.

The powers of the section had doubtless reference to the English statute, and to confer a limited and not general authority.

\*114] “The decisions of the United States courts in relation to writs of mandamus are entirely analogous. They are both prerogative writs, and the defining and limiting the power to issue writs of *habeas corpus* by statute restricts them more than the others.

1 Kent Com., 294.—“It has been decided that Congress has not delegated the exercise of judicial power to the Circuit Court but in certain specified cases. The eleventh section of the judicial act of 1789, giving jurisdiction to the Circuit Court, has not covered the whole ground of the constitution, and these courts cannot, for instance, issue a mandamus but in those cases in which it may be necessary to the exercise of their jurisdiction.”

*McIntire v. Wood*, 7 Cranch, 504; *McClurg v. Silliman*, 6 Wheat., 598; *Kendall v. United States*, 12 Pet., 524-618.

If this is considered one of “the other writs not specified by statute” (§ 14, judiciary act), the term is very properly used,—“necessary for the exercise of their respective juris-



dictions," giving a judicial construction to the meaning of the latter term.

*Ex parte Colura*, 1 Wash. C. C., 232, marg. note.—"The courts of the United States and the justices thereof are only authorized to issue writs of *habeas corpus* to prisoners in jail under color of the authority of the United States, or committed by courts of the United States, or required to testify in a case depending in a court of the United States."

"The jurisdiction of the courts of the United States is limited; and the inferior courts can exercise it only in cases in which it is conferred by act of Congress."

*United States v. French*, 1 Gall., 1, marg. note.—"The Circuit Court has no authority to issue a *habeas corpus* for the purpose of surrendering a principal in discharge of his bail, when the principal is confined in jail merely under process of a State court."

*Per curiam*. "We have no authority in this case to issue a *habeas corpus*. The authority given by the judicial act of 1789, chap. 20, § 14, is confined to cases where the party is in custody under color of process under authority of the United States, or is committed for trial before some court of the United States, or is necessary to be brought into court to testify."

N. B. The party in this case was confined under a penal law of Congress (2 Statutes at Large, 506), in which State courts have, by repeated decision, no jurisdiction.

In all the following cases *habeas corpus* was issued, where the party was confined under color of process of the United States, and although any other exercise of the power was not in express terms denied, yet in a number of them the court proceed upon the assumption of its being so limited, and in no instance form a contrary opinion. *Ex parte Wilson*, 6 Cranch, 52; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Randolph*, 2 Brock., 476, 477; 3 Dall., 17; 4 Id., 412; 3 Cranch, 447; 4 Id., 75; 3 Pet., \*201; 9 Id., 704; 1 Mason, [\*115 71; 2 Brock., 6, 447; 1 Wash., 277. The case in 8 [\*115 Mason, 482, of *United States v. Green*, the only case where granted and point not then raised.

8. Although in numerous decisions infants are doubtless under the control of courts of law as to their custody, and courts having jurisdiction may issue writs of *habeas corpus*, yet the courts, representing the sovereign power of the State, adopt the course which they may deem for the benefit of the child at their discretion. It is an extension of the original purposes of the writ, and not contemplated by the powers of

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the judicial act, nor consistent with the limited authority of the general government.

*DeManneville v. DeManneville*, 10 Ves., 52-66, Ld. Chan. in conclusion, p. 66.—“I must either give the child to the father, when I know not what he proposes to do if it remain with him; or to the mother, to which upon some principles there is great objection; or I must take some middle course; and I shall take care that the intercourse of both father and mother with the child, so far as is consistent with its happiness, shall be unrestrained.” Ordered that the child should not be removed out of jurisdiction.

*King v. Grenhill*, 4 Ad. & E., 624.—“Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house, or into contact with his children, and does not intend to do so.” Marg. note.

The general government is one of defined and limited powers. It is the design of the constitution that the judicial should be co-extensive with the legislative authority, but not to exceed it. These powers are comparatively free and well defined, and are exceptions to the authority residing in the State, and subject to their judicial authority. The great mass of authority remains in the States, and is governed by and dependent upon State authority.

All questions arising out of the domestic relations are peculiarly and appropriately within the province of the State governments; and the court will be slow in countenancing any principle, or giving any construction of the constitution and laws that shall decree to itself this branch of local authority.

In relation to husband and wife, parent and child, the various and diversified and vexed questions that arise concerning the custody of children, the court will not be anxious by any doubtful construction to enlarge their jurisdiction. The court exercising that jurisdiction cannot dispose of the various questions involved, as in ordinary questions of pecuniary value, by a judgment and execution. They must enter the nursery and inquire as to the character and habits of the respective parents,—the wishes of the child,—and make such orders from time to time as may be required by the ever changing circumstances of all the parties concerned. What \*116] portion of these \*questions would this court have to take charge of, and what new set of rules or officers for these wards of the court?

If the writ of error is sustained, and the case remanded,  
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and the Circuit Court ordered to issue the writ, it will be the duty of the Circuit Court to make such orders as will be for the benefit of the child, and vary them from time to time. Can these be reviewed by this court?

This proceeding is really a question as to the custody of an infant child, and of guardianship on the part of the courts of the United States; and although called *habeas corpus ad subjiciendum*, it is so by fiction of law. It is not a question of the personal liberty of the child, but of its custody and nurture. It is not in substance at all that great writ of English or American liberty, but a great extension, if not entire perversion, of its object. .

*Master and Servant.*—Are the relative rights and duties of the master and servant a matter of local or national jurisdiction?

Suppose a servant from Kentucky flies to Ohio. His master pursues him and takes him. He is ordered to bring his writ of *habeas corpus* before the Circuit Court. The court denies the application. He brings his writ of error to this court. Has the court jurisdiction? Will it order the Circuit Court to issue the writ? If not, why not?

If in obedience to the order the Circuit Court issues the writ, and refuses to discharge the person, a writ of error lies to this court.

*Petition for Divorce.*—It is not embraced in the tenth section of the judicial act of 1789.

1. The power of the court to issue the writ at all is given by statute, in the fourteenth section, and must be limited to the purposes, and by the restrictions in the act.

2. It is not a "suit of a civil nature at common law or in equity, when the matter in dispute exceeds the sum or value of \$500."

3. The phraseology in the twenty-fifth section is different, — "in any suit." The object is different, to have the power of the United States, in relation to treaties, constitution, laws, or authority of United States. The term is used in its most general sense,—civil, criminal, equity, and all others. The object is to control the decisions of State courts on national questions. See *Holmes v. Jennison*, 14 Pet., 2.

III. The court has not jurisdiction of the parties. One of the defendants in error, Mrs. Barry, has no domicil in the United States, but follows that of her husband.

1. In order to give the court jurisdiction *all* the defendants must be liable to be sued before the United States court. 1 Kent, Com., 324; *Strawbridge v. Curtiss*, 3 Cranch, 267.

2. "A married woman follows the domicil of her husband.

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This results from the general principle, that a person who is \*117] under \*the power and authority of another possesses no right to choose a domicile." Story, Con. of L., 45, and authorities there cited.

*Greene v. Greene*, 11 Pick. (Mass.), 410.—"The domicile of the wife follows that of the husband." 14 Pick. (Mass.), 181.

So in *settlement cases*.—"A wife and minor child can have no settlement separate from the husband and father." *Shirley v. Watertown*; *Sears v. City of Boston*, 1 Met. (Mass.), 242, absent a number of years, &c. The petitioner himself declares (p. 4), "That the said Eliza Ann, by her intermarriage with your petitioner, became a denizen of the British empire, and entitled to inherit within the said realm as though she were a British subject. All the privileges, advantages, and immunities, being supervenient upon those of her *domicilium originis* as an American citizen." If so, can any thing but a divorce or death deprive her of these rights? He speaks of her going "to her own proper home at Liverpool"; and, p. 6, that his wife should "return to her own proper home and duties."

8. The Supreme Court have their appellate jurisdiction only in those cases in which it is affirmatively given by the acts of Congress, and no such appellate jurisdiction is given in this case. *Wiscart v. Dauchy*, 3 Dall., 321; *Clarke v. Bazadone*, 1 Cranch, 212; *Court of United States Territory northwest of the Ohio*, *United States v. More*, 3 Cranch, 159, criminal case from Circuit Court of District of Columbia; *Ex parte Kearney*, 7 Wheat., 38. No appeal from Circuit Court in criminal cases.

IV. The Supreme Court has not jurisdiction, as the matter in dispute does not amount to \$2,000. *Ex parte Bradstreet*, 7 Pet., 634. "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States has been to allow the value to be given in evidence."

In this case evidence was offered in the court below between Martha Bradstreet and Apollos Cooper, a writ of right of the value of the land in dispute; but that value not appearing on the record the court dismissed the proceedings. Mandamus issued to reinstate the case.

*Per Marshall, C. J.*, p. 647.—"Every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the

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matter in dispute exceeds the sum or value of two thousand dollars.

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States is to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the \*value of the property demanded in evidence at or before the [\*118 trial of the cause," &c.

*United States v. More*, 3 Cranch, 172, per Marshall, C. J., p. 172.—"But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation under the constitution, prohibiting the exercise of other powers than those described." "Thus the appellate jurisdiction of this court from the judgments of the Circuit Court is described affirmatively; no restrictive words are used. Yet it has never been supposed that a decision of a Circuit Court could be reviewed, unless the matter in dispute should exceed the value of two thousand dollars. There are no words in the act restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may reexamine the decisions of the Circuit Court when the matter in dispute exceeds the value of two thousand dollars." The words "matter in dispute" seem appropriated to civil cases, when the subject in contest has a value beyond the sum mentioned in the act.

*Wilson v. Daniel*, 3 Dall., 401.—"The verdict or judgment does not ascertain the value of the matter in dispute," &c.

All the judges, in giving their opinions, proceed upon the ground that the case must be one of pecuniary value.

*United States v. Brig Union*, 4 Cranch, 216, marg. note.—"It is incumbent on the plaintiff in error to show that this court has jurisdiction of the cause." "This court will permit *viva voce* testimony to be given of the value of the matter in dispute."

*Gordon v. Ogden*, 3 Pet., 33. The plaintiff claimed two thousand dollars; had judgment for less; writ of error by defendant below; court held no jurisdiction; *aliter* where writ in such case is by plaintiff below; action for violating a patent.

*Ritchie v. Mauro & Forrest*, 2 Pet., 244, per Marshall, C. J., of Supreme Court, p. 244.—"In the present case the

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majority of the court are of opinion that the court has no jurisdiction of the case; the value in controversy not being sufficient to entitle the party by law to claim an appeal. The value is not the value of the minor's estate, but the value of the office of guardian. The present is a controversy merely between persons claiming adversely as guardians, having no distinct interest of their own. The office of guardian is of no value, except so far as it affords a compensation for labor and services, thereafter to be earned."

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought up by writ of error to the Circuit Court for the Southern District of New York.

It appears from the record that the plaintiff in error is a subject of the queen of Great Britain, and resides in Liverpool, Nova Scotia. \*In April, 1835, he intermarried \*119] with Eliza Ann Barry, one of the defendants in error, who is the daughter of the late Thomas B. Mercein, of the city of New York; and upon some unfortunate disagreement between the plaintiff in error and his wife, a separation took place in the year 1838, and they have ever since lived apart; she residing in New York, and he at Liverpool. They have two children, a son and a daughter. The son is with his father; and the daughter, now about ten years of age, is with her mother.

The plaintiff in error filed his petition in the Circuit Court of the United States for the Southern District of New York, at April term, 1844, stating that his wife had separated from him without any justifiable cause and refused to return, and unlawfully detained and kept from him his daughter; that she was harboured, countenanced, and encouraged in these unlawful proceedings by her mother, Mary Mercein, the other defendant in error; and prayed that the writ of *habeas corpus ad subjiciendum* might issue, commanding the said Mary Mercein and Eliza Ann Barry to have the body of his daughter, Mary Mercein Barry, by them imprisoned and detained, with the time and cause of such imprisonment or detention, before the Circuit Court to do and receive what should then and there be considered of the said Mary Mercein Barry. The petition was supported by the usual affidavits and proofs. The case came on to be heard in the Circuit Court, and it was then ordered and adjudged by the court that the petition be disallowed, and the writ of *habeas corpus* denied. It is upon this judgment that the writ of error is brought.

A motion has been made to dismiss the writ of error for the want of jurisdiction in this court. In the argument upon this motion, the power of the Circuit Court to award the writ of *habeas corpus*, in a case like this, has also been very fully discussed at the bar. But this question is not before us, unless we have power by writ of error to reëxamine the judgment given by the Circuit Court, and to affirm or reverse it, as we may find it to be correct or otherwise. And the question therefore to be first decided is, whether a writ of error will lie upon the judgment of the Circuit Court in this case refusing to grant the writ of *habeas corpus*. It is an important question; deeply interesting to the parties concerned; and we have given to it a full and mature consideration.

By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.<sup>1</sup>

The act of 1789, ch. 20, § 22, provides that final judgments and decrees in civil actions and suits in equity in a Circuit Court, when the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be reëxamined and reversed or \*affirmed in the Supreme [\*120 Court. And it is by this law only that we are authorized to reëxamine any judgment in a Circuit Court by writ of error.

Before we speak more particularly of the construction of this section, it may be proper to notice the difference between the provisions contained in it, and those of the twenty-fifth section, in the same act of Congress, which gives the appellate power over the judgments of the State courts. In the latter case, the right to reëxamine is not made to depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the State court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or cannot be measured by a money standard.

But in the twenty-second section, which is the one now under consideration, the provision is otherwise; and in order to give this court jurisdiction to reëxamine the judgment of a Circuit Court of the United States, the judgment or decree must not only be a final one, in a civil action or suit in equity,

<sup>1</sup> RELIED ON, in dissenting opinion, *Daniels v. Railroad Co.*, 3 Wall., 254, *Ex parte Bradley*, 7 Wall., 384. CITED. *United States v. Young*, 4 Otto, 259.

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but the matter in dispute must exceed the sum or value of two thousand dollars, exclusive of costs. And in order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.

In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute. And it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the twenty-second section of the act of 1789. Is it one of those cases in which we are authorized to reëxamine the decision of a Circuit Court of the United States, and affirm or reverse its judgment? We think not. The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the Circuit Court. And since this court can \*121] \*exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction.



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**JACOB S. MAYBERRY, PLAINTIFF IN ERROR, v. JAMES H. THOMPSON, DEFENDANT.**

Under the acts of 1839, chap. 20 (5 Statutes at Large, 315), and 1840, chap. 43 (5 Statutes at Large, 392), where a case was carried from the District Court for the Middle District of Alabama to the Circuit Court for the Southern District of Alabama, and the Circuit Court reversed the judgment of the District Court, it was not a proper mode of proceeding to bring the case to this court upon such reversal.

The judgment of the District Court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. This court could then have reexamined the judgment of the Circuit Court, if a writ of error were sued out.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Alabama.

It was originally brought by Mayberry in the District Court of the United States for the Middle District of Alabama. Mayberry was a citizen of Mississippi.

The action was brought at the May term, 1841, and was an action of trespass to recover damages from Thompson, for forcibly taking, seizing, and carrying away certain goods, wares, and merchandise of the plaintiff, at Warsaw, in Sumter county, Alabama.

At the November term, 1842, the cause came on for trial, when the jury found a verdict for the plaintiff, and assessed his damages at \$8,709.94. On the trial, the defendant's counsel filed the following bill of exceptions.

Be it remembered, that, in the trial of this cause, the plaintiff in the first instance introduced testimony tending to show that some time in February or March, 1841, he sent cotton and drafts to Mobile, and received the proceeds thereof, about \$8,200, and that he went with the same, and with letters of recommendation, to the city of New York, for the purchase of goods, and there purchased sundry bills of goods, of different houses, for which he paid to each house about one half of the price of each purchase in money, the proceeds of the cotton and drafts aforesaid, and gave his own notes [\*122 \*to said several houses for the residue of the purchase [money, maturing at different dates, which said notes still remain unpaid, and that the sellers of said goods knew no persons in the transaction except the plaintiff; that said goods were marked in the name of the plaintiff, and sent forward to his address for Cooksville, in the State of Mississippi, but that, before reaching their destination, they were seized by

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the defendant, at Warsaw, in the State of Alabama, and by him sold.

The defendant then introduced testimony, conducing to show that a fraudulent and collusive arrangement had been entered into between the plaintiff and one James Randalls, some time in June, 1840, for the purpose of screening the property of said Randalls from claims of his creditors, by which a certain stock of goods and other property, which said Randalls then had, were collusively passed to said plaintiff, and the business of said Randalls thereafter, until after the seizure of said goods by defendant, was carried on in the name of said plaintiff; but that said business, including the sending of said cotton and drafts to Mobile, the raising of said money, and the purchase of said goods in New York, though done ostensibly by said plaintiff, and in his name, was really done by said Randalls, acting by and through said plaintiff, and in his, the plaintiff's, name, and that said goods, seized and sold by the defendant, were by him seized and sold as an officer on process in his hands against said Randalls, as his, the said Randalls's, property, and for his debts; and also that the plaintiff had little or no cotton at or about the time said cotton was forwarded to Mobile as aforesaid.

The plaintiff then introduced the said Randalls as a witness, and asked him the single question, whether he had interest in said goods seized, at the time they were seized and sold; to which question the witness answered that he had not. The defendant then, on cross-examination, for the purpose of contradicting said Randalls by the testimony of other witnesses, if he answered in the negative, and thus impeaching his testimony, inquired of him whether he had stated to an individual, at about the time said cotton was sent to Mobile, that he, the said Randalls, had succeeded in sending cotton to Mobile, so that the same had not been attached; but the plaintiff's counsel objected to the witness answering the question, and the court ruled that the inquiry was of matter collateral and irrelevant, and that the witness need not answer the question propounded, and he did not answer the same. The defendant, also, for the same purpose last expressed, proposed to inquire of said Randalls, whether he had not stated to a certain individual, at or about the time said plaintiff left for New York, for the purchase of said goods, that he, the said Randalls, had sent said plaintiff for goods; but it was ruled by the court that it would not be competent for the defendant to discredit said witness by showing that he had made statements when out of court,

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and not on oath, different from \*his testimony given in court; and the question was not permitted to [\*123 be put.

The court instructed the jury, that if they believed that the goods purchased by the plaintiff in New York were purchased with the money of the said Randalls, and that the plaintiff acted merely as a shield for said Randalls, to protect the said goods from Randalls's creditors, that the said goods were to be considered as the goods of Randalls, and were lawfully attached by the defendant on an execution against Randalls; but that when the goods were purchased for said Randalls in part with the money of Randalls, and in part upon the credit of plaintiff, he giving his note to the several New York mercantile houses from which the purchases were made, and they being ignorant of any fraud between the plaintiff and said Randalls, then the said goods thus purchased could not lawfully be sold by the defendant on execution against said Randalls; that the remedy of creditors of Randalls, when the goods were purchased in part with the money of Randalls, and in part upon credit of plaintiff, was in a court of equity, where the interest of all concerned might be apportioned and adjusted.

The defendant thereupon requested the court to instruct the jury, that if they should find for the plaintiff, they might, in making up their verdict, deduct from the amount the money and lawful interest thereon, in all cases where said goods were purchased in part with the money of Randalls, and in part upon the credit of the plaintiff; which charge the court refused to give.

And the defendants took exception to the beforementioned ruling and charge of the court, and the refusal to charge as requested, and prayed that his said exceptions might be signed, sealed, and allowed, and the same is done accordingly.

The defendant, Thompson, sued out a writ of error, and carried the case to the Circuit Court of the United States for the Southern District of Alabama, under the act of 1839, ch. 20 (5 Stat. at L., 315).

At March term, 1843, the Circuit Court passed the following order:—"This day came the parties, by their attorney, and this cause coming on to be heard upon the transcript of the record, and the matters assigned for error being heard by the court, and mature deliberation being thereupon had, it is considered by the court that there is error in the record and proceedings of the said District Court; whereupon, it is ordered and adjudged by the court there that the judgment

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of the District Court be reversed and annulled, and that the said plaintiff recover his costs."

From which judgment Mayberry sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Brockenbrough* and *Mr. Sherman*, for the plaintiff in error, and *Mr. Dargan*, for defendant in error.

\*124] "The third point of the counsel for the plaintiff in error was the one upon which the opinion of this court turned, and is therefore the only one inserted. It was as follows:—

III. As to the *venire facias de novo* and an absolute reversal.

There can be no doubt that if the Circuit Court was clear, from the record, that the plaintiff had no cause of action, and was not entitled to recover in any event, under the facts, that that court was right in absolutely reversing the judgment. But if the Circuit Court considered the District Court correct in its judgment as to the illegality of the levy and sale, but wrong as to the question of evidence in the cross-examination of Randalls only, then it should not have reversed the judgment absolutely, but have remanded it with a *venire de novo*, that the plaintiff might have the benefit of his meritorious right of action, and the defendant not be deprived of his full rights in the cross-examination.

But as we contend the District Court was right in both points, we ask to set aside the reversal, and set up the judgment of the District Court.

But if this court thinks the District Court did not err upon the main question, but did err on the question of the cross-examination, then this court will reverse the decision of the Circuit Court, with the proper directions; because that court did not award a *venire facias de novo*.

The counsel for the defendant in error noticed this point as follows:—

The act of Congress that established the Middle District of the State of Alabama, and allowed appeals and writs of error from that court to the Circuit Court for the Fifth Judicial Circuit, does not by any express words make it obligatory on the Circuit Court to award a *venire de novo*, but is silent on the subject, therefore we must look to the general rules of practice on this subject. I admit that the Circuit Court may award the *venire de novo* on reversing the judgment of the District Court, but I deny that an omission to do so can be reached by a writ of error, unless the party

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claiming the *venire* had asked the court below to award it, and the court had refused it. It is a settled rule, that a party complaining of errors must show it affirmatively; he must show that the inferior court erred, and this error was prejudicial to his rights. *Bradstreet v. Huntington*, 5 Pet., 402.

Now, the defendant in error in the Circuit Court (who is plaintiff here) could have demanded a *venire de novo*, but he did not; the Circuit Court, therefore, did not deny him the right of the writ of *venire*, nor act on it. How did this action of the Circuit Court leave the rights of the plaintiff in error?

The judgment of the District Court was reversed, and held for nought. The parties were put by this judgment in the same situation they occupied before the suit was brought; and the plaintiff in error in this court could have [\*125 issued a new writ. In *Bank of the United States v. Bank of Washington*, 6 Pet., 8, the Supreme Court held, that a party who had derived a benefit from a judgment which had been reversed, must make restitution; that is, the reversal of the judgment puts the parties in *statu quo*. So in 2 Gall., 216, it is held, that a judgment reversed is no bar to an action on the same subject-matter. So in 1 Root (Conn.), 421, it is decided that, if a judgment on a note is reversed the note is revived; to the very same effect see 10 Mass., 433; 5 Id., 264; 3 Johns. (N. Y.), 443.

These authorities, I think, settle the point that Mayberry, on the reversal of the judgment by the Circuit Court, could have brought a new suit in the State or federal courts, or he could have demanded a *venire de novo*. But he had the option to do the one or the other; he did not inform the court which remedy he chose. Can he now complain of error that the court left him to select for himself? Can he complain that the court did not grant him a remedy which he did not apply for, when he had the power to select between two remedies? This view will show that the court did him no injury,—the court was merely passive; it did not decide on any right, nor act on any. Will error lie, therefore, in such a case? If so, may I not well ask, in what did the court err?

Again. The motion for the *venire* must be made in the court below. I think it plain that the party cannot come here by writ of error, and, for the first time, move for the *venire* in this court; the object of the writ of error being merely to make such a motion.

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Mr. Chief Justice TANEY delivered the opinion of the court.

Upon looking into the record, in this case, we find that there was no final judgment in the Circuit Court, and consequently no writ of error will lie from this court.

It appears that the plaintiff in error brought an action of trespass against the defendant, in the District Court for the Middle District of Alabama, for taking and carrying away certain goods and chattels alleged to be the property of the plaintiff, and recovered a judgment for \$3,709.94 and costs.

A bill of exception was taken by the defendant to the rulings of the court upon several points raised at the trial, and the case removed by writ of error to the Circuit Court for the Southern District of Alabama, where the judgment of the District Court was reversed with costs. And upon this judgment of reversal, without any further proceedings in the Circuit Court, the plaintiff sued out a writ of error from this court.

The writ of error to remove the case to the Circuit Court is given by the act of 1839, ch. 20, § 9; and as this law contains no special provision in relation to the judgments of the Circuit Court in such cases, the decisions of that court must \*126] be reëxamined here, \*in the manner and upon the principles prescribed in the general laws upon that subject.

The judiciary act of 1789, § 24, provides, that where the judgment of a District Court is reversed in the Circuit Court, such court shall proceed to render such judgment as the District Court should have rendered. Under this act, however, the judgment of a Circuit Court upon a writ of error to a District Court could not be reëxamined in this Court; no writ of error in such cases being given. And so the law stood until the act of July 4th, 1840, ch. 43, § 3, which provides that writs of error in such cases shall lie, upon the judgment of a Circuit Court, "in like manner and under the same regulations, limitations, and restrictions as were there provided by law for writs of error on judgments rendered upon suits originally brought in the Circuit Court." And, under the 22d section of the act of 1789, writs of error on judgments rendered in a Circuit Court upon suits originally brought there will lie only in cases when the judgment is a final one, and the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs.

It is evident that the judgment of the Circuit Court now before us is not a final one. It does not dispose of the matter in dispute. And if it was affirmed in this court, it would

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still leave the matter in dispute open to another suit; and might result in another writ of error to remove it to the Circuit Court, and then again to this court. The act of Congress certainly never intended to sanction such fruitless and inconclusive litigation; and therefore directed that the Circuit Court should give such judgment as the District Court ought to have given, that is to say, a final judgment upon the matter in dispute. Instead of suing out a writ of error upon the judgment of reversal, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. And if he supposed any of the rulings or instructions of the court at the trial to be erroneous, he would have been entitled to his exception, and this court could then by writ of error have reëxamined the judgment of the Circuit Court, and finally decided upon the matter in controversy in the suit.

But upon the judgment of reversal only, which leaves the dispute between the parties still open, no writ of error will lie, and the writ issued in this case must therefore be dismissed.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that this cause be and the same is hereby dismissed for the want of jurisdiction.

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\*JOHN G. NELSON, CHARLES G. CARLETON, WILLIAM H. STEWART (PARTNERS IN TRADE UNDER THE NAME OF NELSON, CARLETON, & Co.), HENRY PARISH, DANIEL PARISH, JOHN R. MARSHALL, JOHN B. SEAMAN, THOMAS PARISH, LEROY M. WILEY (PARTNERS IN TRADE UNDER THE NAME OF PARISH, MARSHALL, & Co.), APPELLANTS, v. JOHN J. HILL, JOHN P. LIPSCOMB, ABSALOM HARDIN, LORENZO I. SEXTON AND ANN R. SEXTON (HIS WIFE), AND JAMES GRAY, DEFENDANTS. [\*127

It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill.<sup>1</sup>

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<sup>1</sup> If there is a common liability and a common interest in the defendants and a common interest in the plaintiffs,—different

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An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself.<sup>2</sup>

The creditor of a partnership may, at his option, proceed at law against the surviving partner or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased.<sup>3</sup>

Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms and also against the surviving partner of one of the firms.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The suit originated in the District Court of the United States for the Middle District of Alabama, from which it was carried, by appeal, to the Circuit Court, and thence was brought to this court.

In 1834, the appellants, consisting of two mercantile houses in New York, became the creditors of two firms in the State of Alabama, namely, the firms of Whitsett, Gray, & Co. and of Whitsett & Gray; the former composed of William H. Whitsett, Thomas Gray, John J. Hill, the latter of William H. Whitsett and Thomas Gray.

The debts of these Alabama houses to their New York creditors set forth as follows:—

Whitsett, Gray, & Co. to Nelson, Carleton, & Co., a note dated May 17th, 1834, for \$1,061.36, at 9 months; Whitsett, Gray, & Co. to Parish, Marshall, & Co., two notes, one dated May 10th, 1834, for \$1,470.95, at 9 months, and one, same date, for \$1,470.95, at 11 months; a bill of exchange drawn by Whitsett, Gray, & Co. on John C. Sims & Co. for \$1,901.56,

claims to the property may be united in one suit, at least if the subjects are such as may be joined without inconvenience. *Campbell v. MacKay*, 1 Myl. & C., 623; *Attorney-General v. Cradock*, 3 Id., 85. If the interests of the plaintiffs are the same, although the defendants have not a co-extensive common interest, but their interests are derived under different instruments, if the general object of the bill will be promoted by their being united in one suit, the court will allow it. *Ib.*; *Attorney-General v. St. John's College*, 7 Sim., 241; see *Gaines v. Chew*, 2 How., 619.

<sup>2</sup> The objection to multifariousness cannot be raised at the hearing. *Ward v. Cooke*, 5 Madd., 122; *Wynne v.*

*Calender*, 1 Russ., 293; *Whaley v. Dawson*, 2 Sch. & L., 370; *Benson v. Hadfield*, 4 Hare, 32.

But the court may, of its own motion, on the hearing, make the objection. *Greenwood v. Churchill*, 1 Myl. & K., 559; *Oliver v. Piatt*, 3 How., 333.

<sup>3</sup> APPLIED. *Lewis v. United States*, 2 Otto, 622. And see *Comins v. Culver*, 8 Stew. (N. J.), 96; *Thrope v. Jackson*, 2 Younge & Coll., 553; *Hamersley v. Lambert*, 2 Johns. (N. Y.) Ch., 508; *Belknap v. Abbott*, 11 Ohio, 411; *Ex parte Clegg*, 2 Cox's Cas., 372; *Camp v. Grant*, 21 Conn., 41; *Lewis v. United States*, 14 Bank. Reg., 64, 69; *United States v. Lewis*, 13 Id., 33.



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at 4 months; and a note to White, Brothers, & Co., by Whitsett, Gray, & Co., for \$331.46, at 12 months.

Of the individuals composing the two Alabama firms, William H. Whitsett died in October, 1835, and administration of his estate was committed to Lipscomb & Hardin. Thomas Gray died in 1835, and administration of his estate was granted to James Gray and Ann R. Gray, the widow of Thomas, who afterwards intermarried with Lorenzo Sexton.

\*Upon three of the above notes, judgments were obtained in December, 1835, against Hill, as surviving [\*128 partner of Whitsett, Gray, & Co. In January, 1840, a bill was filed on the equity side of the District Court of the United States for the Middle District of Alabama by the New York firms, which, in August, 1841, was amended. The amended bill included, as defendants, James Gray, Lorenzo Sexton and Ann R. Sexton (formerly Ann Gray), administrators of Thomas Gray, deceased, Absalom Hardin, John P. Lipscomb, and Joseph J. Hill, administrators of William H. Whitsett, deceased.

The bills recited the above fact; stated that execution had been sued out against Hill, but that no property could be found; that the estate of Whitsett had been reported to the County Court as insolvent, but that the estate of Gray was fully able to pay the debts of the partnerships; praying for a discovery and payment, &c.

Lipscomb and Hardin answered the bills, denying generally the merits of the claim.

Hill answered separately, and concluded his answer with denying the right of the complainants to unite their claims in one suit.

Gray filed a separate demurrer, assigning therefor the following causes:—

I. That the said complainants have not by their said bill and amended bill made such a case as entitles them in a court of equity to any discovery from this defendant or any relief against him as to matter contained in the said bill and amended bill, &c.

II. That the complainants have joined in their bill and amended bill distinct matters which, according to law and the practice of this court, ought not to be joined, &c.; that is to say, have joined matters against the late firm of Whitsett & Gray, composed of Wm. H. Whitsett, deceased, and Thomas Gray, deceased, with matters against the late firm of Whitsett, Gray, & Co., composed of the said Whitsett & Gray and one John J. Hill, the said John J. Hill having no interest in the matter against the said late firm of Whitsett & Gray.

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They have joined matters of debt against said late firm, Whitsett & Gray, created by note, payable to certain persons using the name and style of White, Brothers, & Co., to which debt the said complainants, or either of them, have not any interest, as far as appears by their said bill or amended bill, and in which the said defendant, Hill, is in no wise interested, nor in any wise liable, &c.

III. The complainants' bill and amended bill do not show that complainants had exhausted their remedy at law before coming into this court in such manner as to entitle them to the aid of this honorable court as a court of chancery, &c. Wherefore, for the foregoing causes, and for divers other causes of demurrer appearing in the said bill and amended bill, this defendant doth demur thereto; and he prays the judgment \*129] of this honorable court whether he shall \*be compelled to make further and other answers to the said bill; and he humbly prays to be dismissed from hence with his reasonable cost in this behalf sustained.

In December, 1841, the cause came before the District Court, which sustained the demurrer.

The complainants appealed to the Circuit Court, which in March, 1843, affirmed the decree of the District Court. From the decision of the Circuit Court the complainants appealed to this court.

The cause was argued by *Mr. Dargan*, for the appellants, and *Mr. Crittenden*, for the appellees.

*Mr. Dargan.*

The decree, rendered on the demurrer of James Gray, dismissed the bill as to all the defendants, and they were adjudged to recover their costs. This was the necessary result upon sustaining the demurrer of James Gray, for he being a joint administrator with Sexton and wife, the suit could not proceed without him. The appeal was taken against all the defendants, and the cause was pending properly in this court, when Gray died; his death did not abate the suit or render it defective, for his entire interest survived to Sexton and wife, and the administrator of James Gray has no interest in the suit. Therefore the cause is not out of court or abated by the death of James Gray, nor is it necessary to make his representatives parties. The only question that can be raised against the bill is, that it is multifarious.

The bill is not multifarious because it is filed in the name of Parish, Marshall, & Co. and Nelson, Carleton, & Co., two distinct firms.

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It is well settled that when a creditor seeks the aid of a court of equity to subject the assets of a deceased debtor to the payment of his debt, he may sue for himself and all other creditors who will make themselves parties to the suit, unless his application to a court of equity be founded on a specific lien on a specific chattel, or on particular real estate, as a mortgagee. But in the absence of any specific lien, that would give him an exclusive right as against the thing bound by the lien, he may sue for himself and all other creditors. Story's Equity Pleadings, §§ 99, 100, and the cases cited.

Indeed, if the bill seeks to subject the real estate of the decedent, it is said the creditor must sue in behalf of all; here two firms sue for themselves and all other creditors who will join in the suit.

The bill is not multifarious because it seeks to obtain satisfaction of debts due Nelson, Carleton, & Co. and Parish, Marshall, & Co. by Whitsett, Gray, & Co., and also debts due Parish, Marshall, & Co. by Whitsett & Gray alone. The debts due the complainants by Whitsett, Gray, & Co. had been sued at law against Hill, the surviving partner, and executions have been returned,—“no property”; \*of [\*130 the assets of the deceased partners on those debts, for they have done all at law they can do. Now, if it be true that, as to the two debts due by Whitsett & Gray alone to Parish, Marshall, & Co., they have a perfect remedy at law, or if they have as yet no equity, because they must proceed at law first against the administrators of Whitsett, the question will then be raised,—if complainants seek to enforce an equitable right, and in the same bill state a different and legal right, as to which equity will afford no relief, and this is apparent on the bill, will the statement of this legal right and prayer for relief, which by possibility cannot be granted, render the bill defective as to the equitable right? To hold that a bill thus framed would be defective, would be a rigid rule, not perhaps productive of benefit or convenience; would it not go to the full extent, that a complainant must recover on all causes of actions or suits stated in his bill, or he could not recover at all? I have not found a case that goes thus far, and I submit that no case can be found where a bill is held to be multifarious because it states and seeks relief as to a clear equitable right, and also states and seeks relief as to a different and distinct legal right; but relief would be granted as to the equitable right; and so far as it sought relief on a legal title the bill would be dismissed at the hearing. If I am right in this view, the demurrer should not have been

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sustained, even if the debts due by Whitsett & Gray alone to Parish, Marshall, & Co. cannot be enforced in equity against the representatives of Gray, or if their remedy on these two debts is at law. As to the doctrine of multifariousness, see *Gaines v. Chew et al.*, 2 How., 619; Story on Eq. Pl., 515-517.

This view is submitted on the supposition, that the court may hold that Parish, Marshall, & Co. have a perfect right at law on the two debts not sued at law, and due by Whitsett & Gray alone to them. But I think the rule is now well established, that a creditor may file his bill in the first instance against the assets of a deceased partner, notwithstanding the surviving partner may even be solvent. See 1 Myl. & K., 582. This seems to be a well considered case, and maintains this position; also Story on Partnership, § 362, pp. 513, 514; also the case of *Devaynes v. Noble*, 1 Meriv., 589. I admit that formerly the reverse was held to be the law; but since the decision in the case of *Devaynes v. Noble*, the rule seems to be settled, that a creditor may go into equity in the first instance against the assets of a deceased partner, although the surviving partner may be solvent. The text writers have adopted this rule without objection. If the court should hold this to be the rule, then Parish, Marshall, & Co. would be entitled to relief against the administrators of Thomas Gray, although no suit was brought against Whitsett's representatives who had survived Gray; and in that aspect of the case, could Thomas Gray, administrator, demur, because \*Parish, Marshall, & Co. sought \*131] to enforce debts chargeable on the estate, because the deceased was liable on them,—on one jointly with A., the other jointly with B. The estate is bound for both, they are both merely debts, and due to the same complainant. The same authorities show that when a bill is thus filed against the representatives of the deceased partner, the surviving partner, whether solvent or insolvent, is a necessary party to the bill, although no decree can be rendered against him, for the remedy as against him is at law.

In conclusion, if the remedy on the bill and note to Parish, Marshall, & Co., due by Whitsett & Gray, is at law exclusively; or if, as yet, Parish, Marshall, & Co. are not entitled to equitable relief as to these two debts, then the demurrer is too broad, and should not have been sustained. But if they go into equity in the first instance against the assets of Gray, these two debts are merely debts due by Gray; and what inconvenience will result from uniting them with other

debts due the same complainant by Gray? For the reasons above stated, the court erred in sustaining the demurrer.

*Mr. Crittenden* referred to the complicated nature of the suit, brought by two firms against two other firms, and contended that it was objectionable on account of multifariousness, misjoinder of parties, and causes of action. That a judgment should have been obtained against the surviving partner at law, before resorting to equity. For these principles, he cited 2 Madd. Ch., 294; 2 Anstr., 447; Hardr., 337; 2 Ves., 323; 1 Story on Part., 512-514.

Mr. Justice DANIEL delivered the opinion of the court.

Amongst the causes assigned for the demurrer in this case no objection is urged as founded upon the joinder of the different complainants in the bill and amended bill, unless it be supposed that an objection may be implied in the general language of the first assignment, namely, that the complainants had not by their bills made such a case as entitled them to relief. From a statement thus vague and indefinite it would be difficult to deduce any one objection rather than another; but could this assignment be understood as pointing specifically to the structure of the bills as multifarious, from the number or relative position of the complainants, it is certain that no valid exception could on either of those grounds be sustained.

These bills are formally, as well as substantially, creditors' bills, by which the complainants are regularly and properly united in seeking satisfaction from subjects against which, as creditors of the defendants, they can properly claim. As to the nature and regularity of such a proceeding see Mit. Eq. Pl., 166, 167; Story, Eq. Pl., §§ 99, 100, and the authorities there cited.

\*From a want of perspicuity in the statements contained in the bill and amended bill, in the former especially, there might seem at first view some plausibility in the second cause assigned for the demurrer, namely, the multifariousness of the bills from the joinder of parties as defendants, who are supposed to be unconnected in interest and in liability. The objection of multifariousness is one of which it is said by the authorities a defendant can avail himself by demurrer or exception taken to the pleading only. That being designed for his protection against the vexation and expense of answering to matters irrelevant to the true controversy existing between him and the complainant, if instead of arresting the irregularity at the commencement and claim-

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ing the exemption intended for him, he will go on and answer the bill, the reason for the exemption designed by the rule no longer exists; and although at the hearing the court may, *sponte sua*, make an objection for multifariousness, it is no longer in the power of a party, after answer, to do so. See *Whaley v. Dawson*, 2 Sch. & L., 370, and *Ward v. Cooke*, 5 Madd., 80. From the character of this objection, then, and from the established requisition as to the time and mode of making it by a defendant, it must of course be tested and determined by the structure of the bill alone, and cannot be enforced, explained, or removed by proceedings posterior to the bill and demurrer, nor by the evidence. From some obscurity in the bill and amended bill, as has already been observed, there might seem to be a want of connection in interest and in liability between the defendants, such as would not warrant their being joined in the same suit. This objection, however, will entirely vanish upon a closer examination of the relative positions of the parties.

The complainants consist of two sets of creditors. First, the firm of Nelson, Carleton, & Co.; secondly, the firm of Parish, Marshall, & Co. To each of these firms the copartnership of Whitsett, Gray, & Co. became indebted. The debt contracted to the former house was evidenced by the note of Whitsett, Gray, & Co. The debts (for there were several in the second instance) due to Parish, Marshall, & Co. were evidenced by two notes of Whitsett, Gray, & Co., by a bill drawn by Whitsett, Gray, & Co. on Sims & Co. (which it is alleged was not accepted), and by a note of Whitsett & Gray, payable to White, Brothers, & Co., and passed in some mode not distinctly set forth by Whitsett, Gray, & Co. to Parish, Marshall, & Co. The firm of Whitsett, Gray, & Co. was composed of William H. Whitsett, Thomas Gray, and John J. Hill; that of Whitsett & Gray was composed of William H. Whitsett and Thomas Gray. Thus it appears that Thomas Gray was a member of both firms. The complainants allege the deaths of both Whitsett & Gray, leaving Hill as surviving partner of the firm of Whitsett, Gray, & Co. They aver that Lipscomb & Hardin administered upon the estate of Whitsett, and had reported \*133] that estate \*to the County Court to be insolvent; that Ann R. Gray, widow of Thomas Gray, and who had intermarried with L. Sexton, had, conjointly with James Gray, taken administration of the estate of Thomas; that upon judgments obtained on the notes of Whitsett, Gray, & Co., against Hill, the surviving partner, executions had been sued out and returned *nulla bona*. There is, in the next

place, charged a belief of frauds and concealment on the part of Hill, and the administrators of Whitsett, and also the perfect solvency of the estate of Thomas Gray; the whole concluding with a prayer for accounts of the effects of Whitsett, Gray, & Co., of William H. Whitsett, and of Thomas Gray, in the hands of their representatives, and for satisfaction.

It is now a rule of law too well settled to be shaken, that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner. See the several cases on this point collected in Story on Partnership, § 362, note 3. This being conceded, there can be no valid exception to the prosecution of this suit immediately against the representatives of Thomas Gray, and it is to the advantage of his estate, that the representatives of Whitsett, and the surviving partner, Hill, should both be called in, that they may be required to contribute from any appropriate means in their possession towards the discharge of their joint and several obligations. Here, then, will be perceived the answer to the third cause assigned for the demurrer, namely, that the complainants had not exhausted their remedy at law before going into a court of equity. It is the right also of the representatives of the deceased partner, Whitsett, and that of the surviving partner, Hill, to participate in settlements in which their interests are directly involved; and an omission in the bills to convene these joint parties in interest for this purpose, with the representatives of the other deceased partner, Gray, would have exhibited a palpable and material defect in the proceedings of the complainants.

According to the case made in the bill and amended bill, there are no visible partnership effects, and it may be the fact, that the surviving partner, Hill, and the estate of the deceased partner, Whitsett, are both insolvent. Should this turn out to be true, then the separate estate of the partner, Gray, said to be solvent, must be responsible to the creditors of each of the firms of which he was a member. In order to ascertain the precise extent of Gray's responsibility, accounts would be proper, not only between the two firms and their respective creditors, but also between these firms themselves. Accounts would likewise be proper of the separate effects of the deceased partners. This view of the case removes the ground set forth in the second assignment of causes of demurrer. We are of opinion that the court could, in equity, properly take cognizance of this cause without the necessity

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\*134] for further previous \*proceedings at law; that the bill and amended bill of the complainants were not exceptionable for multifariousness; that the decree of the Circuit Court dismissing those bills for either of the causes assigned for the demurrer is erroneous. The decree is therefore reversed, and this cause is remanded to the Circuit Court, with directions to be there proceeded in, conformably with the principles here established.

## ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is ordered and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

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JOHN A. ROWAN AND JOHN L. HARRIS, COPARTNERS IN TRADE UNDER THE NAME AND STYLE OF ROWAN AND HARRIS, PLAINTIFFS IN ERROR, v. HIRAM G. RUNNELS, DEFENDANT IN ERROR.

## SAME v. SAME.

In the case of *Groves v. Slaughter* (15 Pet., 449) this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale.

This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case.

This court adheres to the construction of the constitution which was given in the case of *Groves v. Slaughter*, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of *Groves v. Slaughter*, declared such contracts to be void.<sup>1</sup>

THESE cases were brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi. Rowan and Harris were citizens of Virginia, and Runnels was a citizen of Mississippi.

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<sup>1</sup> RE-AFFIRMED. *Truly v. Wanzer*, 176, 181. DISTINGUISHED. *Jessup v. post*, \*141; *Sims v. Hundley*, 6 How., *Carnegie*, 80 N. Y., 448. See also 1, 6. FOLLOWED. *Talcott v. Town-ship of Pine Grove*, 1 Flipp., 126, 128, *Moore v. Clopton*, 22 Ark., 125, 128; *Opinion of the Judges*, 58 N. H., 685.



Both cases depended upon the same principle, and differed only in this, that, in one, Runnels executed to Rowan & Harris his own note, and, in the other, indorsed over to them a promissory note executed by George W. Adams. Both notes were due on the 1st of March, 1840, one being for \$2,950.70, and the other for \$8,671.33. At maturity the notes were protested for non-payment, and suits brought upon them.

At the trial, the defendant offered in evidence a transcript of the record of a suit pending in the Supreme Court of Chancery of the \*State of Mississippi, wherein Rowan & Harris were complainants, and George W. Adams [\*135 and others, defendants, one object of which was to show that the consideration for the notes was a sale of slaves by Rowan & Harris to Runnels. Whereupon the defendant moved the court to instruct the jury, that if they believed, from the evidence, that the original consideration of the note sued on was the sale by plaintiffs to defendant of slaves introduced into the State of Mississippi for sale and as merchandise by plaintiffs, since the 1st day of May, 1833, that then said note was void, and they should find for the defendant. Which instruction the court gave to the jury as moved for by the defendant. To the giving of which instruction the plaintiffs excepted, and upon this exception the case came up to this court.

*Mr. Nelson*, for the plaintiffs in error, contended that the case was entirely covered by the decision of this court in 15 Pet., 449.

*Mr. Bibb*, for appellees.

These cases grew out of that provision of the constitution of the State of Mississippi which is in these words:—"The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, one thousand eight hundred and thirty-three.

The decision of this court, at the January term, 1841, upon the construction of that clause of the constitution of the State of Mississippi, in the case of *Groves v. Slaughter*, 15 Pet., 449, was, that the constitution of the State of Mississippi referred the subject of the prohibition to the legislature as a duty to be performed by that body, and that there was no prohibition until the legislature should act.

That decision is a precedent, not binding upon the appellees in these two cases, because they were not parties to that case, neither are they privies. They have a right to

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avail themselves of the benefit of all the additional lights and after circumstances.

The principle is well settled and firmly established by the decisions of this court, again and again repeated and exemplified, that the construction which the courts of the several States have given to their own constitutions and statutes, respectively, ought to control the decisions of this court upon questions of right growing out of State constitutions and State statutes, unless they come in conflict with the constitution, laws, or treaties of the United States. The decision in the case of *Groves v. Slaughter*, 15 Pet., 449, alludes to this principle; but, in the opinion of the court, it is said:—"The case chiefly relied upon is that of *Glidewell and others v. Hite and Fitzpatrick*, a newspaper report of which has been furnished to the court. It was a bill in equity filed some time in the year 1839, since the commencement of the suit \*136] now before \*this court, and the decree of the chancellor affirmed in the Court of Appeals by the divided court, since the judgment was obtained in this cause. But if we look into that case, and the points there discussed, and the diversity of opinion entertained by the judges, we cannot consider it as settling the construction of the constitution."

As the case of *Groves v. Slaughter* itself was decided by a "divided court," as there was a "diversity of opinion entertained by the judges," as it was a case of first impression, deciding upon the construction of a clause in the constitution of the State of Mississippi, which the decisions of the courts of that State had not then settled, as the court then said; and as Mr. Justice Barbour died before the decision, and Mr. Justice Catron did not sit in the case from indisposition, and as Justices Story and McKinley dissented from the opinion delivered, it is submitted, with great deference, that the opinion in *Groves v. Slaughter* is open to argument upon these two points:—

1st. The imperative obligation upon this court to adopt the construction given by the courts of Mississippi to their constitution, when settled.

2dly. That decisions of the courts of the State of Mississippi have now settled the construction contrary to the decision in *Groves v. Slaughter*.

1. The imperative obligation upon this court to adopt the construction given by the courts of the State of Mississippi to their constitution, when settled by such decisions.

Out of a very great number of precepts and examples

given by this court upon that subject, a single decision will suffice.

In the case of *Elmendorff v. Taylor*, 10 Wheat., 159, the opinion of the court, delivered by Chief Justice Marshall, declares:—"This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes; and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several States \*to the legislative acts of those States is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This case is the more impressive, because this court adopted the construction given by the Court of Appeals of Kentucky to a statute enacted by the State of Virginia, and conformed to the three last decisions of that court, which conflicted with nine former decisions of the court by the former judges, which former decisions were in a degree fortified by the opinion of this court in the case of *Wilson v. Mason*, 1 Cranch, 100 (that the particular descriptions in a certificate of survey, before a copy could be demanded as of right, and when it could only be inspected by the courtesy of the surveyor, could not be used by a locator to help out his entry and communicate the necessary notoriety). This court did, notwithstanding, in the case of *Elmendorff v. Taylor*, say,—“We must consider the construction as settled finally by the courts of the State; and this court ought to adopt the same rule, should we even doubt its correctness.” 10 Wheat., 165.

The reasoning just quoted is so clearly demonstrative and

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convincing that the citations of the other decisions of this court would be superfluous.

2. The decisions of the Supreme Court of the State of Mississippi have now settled the construction of the constitution of that State relating to the point involved in these cases:

The cases decided by the court of Mississippi, as reported in 5 How. (Miss.), 100, 110, 769, and 7 Ib., 15, are referred to as having settled the construction of the clause of their constitution now under consideration.

The courts of Louisiana have, in questions growing out of the prohibition in the constitution of Mississippi before quoted, conformed to the decisions of the court of Mississippi, of which an example is to be found in 6 Rob. (La.), 116. And the courts of Tennessee have in like manner conformed; but as the book of reports, containing the decisions of the Supreme Court of Tennessee, has been taken out of the library of the court, I am not able to cite the particular case, nor do I deem it material; the decisions of the court of Mississippi being the proper standard to which all other courts should conform upon such a question.

It would be highly inconvenient that one construction of the organic law of the State of Mississippi should prevail in the courts of that State and of the adjoining States, and that another and different construction of the same instrument should prevail in the federal courts.

The decision in *Groves v. Slaughter*, 15 Pet., 449, was by "a divided court"; two justices were absent, in a case of the first impression, and when the construction fixed by the judiciary \*department of the government of Mississippi

\*138] had not settled the proper construction. Now that it is settled by the courts of that State, this court is bound to adopt it as the proper and true construction.

According to the principles decided by this court between *Elmendorff v. Taylor*, 10 Wheat., 165, and various others too tedious to mention, this court is no more at liberty to depart from the construction of the State constitution, so settled by the judicial department of the State of Mississippi, than the courts of that State would be to depart from the construction of the constitution, statutes, and treaties of the United States, as settled by this Supreme Court of the United States.

Mr. Chief Justice TANEY delivered the opinion of the court.

This action was brought in the Circuit Court for the Southern District of Mississippi, by the plaintiffs, upon a

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promissory note made to them by the defendant for \$2,950.70, dated March 27th, 1839, and payable on the 1st of March, 1840.

The defendant offered in evidence that the only consideration of this note was certain slaves sold by the plaintiff to him in Mississippi in the year 1836, this note being given to take up former securities which had not been paid; and that the said slaves were introduced and imported into the State in the year last above mentioned, by the plaintiffs, as merchandise and for sale.

Upon this evidence, the court instructed the jury that if the slaves were so introduced after the 1st of May, 1833, the note was void, and their verdict must be for the defendant. The plaintiffs excepted to this instruction, and the verdict and judgment being against them, they have brought the case here by writ of error.

The Circuit Court held this contract to be illegal and void, under the following section of the constitution of Mississippi, adopted in 1832.

"The introduction of slaves into this State, as merchandise or for sale, shall be prohibited from and after the 1st day of May, 1833; provided the actual settler or settlers shall not be prohibited from purchasing slaves in any State in this Union, and bringing them into this State for their own individual use, till the year 1845."

The question presented in this case is precisely the same with that decided by this court in the case of *Groves v. Slaughter*, reported in 15 Pet., 449. And the court then held, after hearing a very full and elaborate argument, that the clause in the constitution of Mississippi, relied on by the defendant, which went into operation on the 1st of May, 1833, did not of itself prohibit the introduction of slaves as merchandise and for sale; and that contracts for the purchase and sale of slaves so introduced, made before the passage of the law of that State of May 13th, 1837, were valid and binding upon the parties. The reasoning, upon which that opinion was \*founded, is fully set forth in the report [\*139 of the case, and need not be repeated here.

It now appears, however, that the question has since been brought before the courts of the State, and it has been there settled by its highest tribunals that the clause in the constitution above referred to did, of itself and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale; and rendered all contracts for the sale of such slaves, made after May 1st, 1833, illegal and void. And it is argued that inasmuch as this court

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adopts the construction given by the State courts to their own constitution and laws, we ought to follow the decisions in Mississippi, and declare the contract before us to be void, notwithstanding the case of *Groves v. Slaughter*.

But we are not aware of any decision in this court which presses the rule so far, or that would justify this court in declaring contracts to be void upon this ground which upon the fullest consideration it has so recently held to be good. It will be seen, by a reference to the opinion delivered in the case of *Groves v. Slaughter*, that the court were satisfied not only that the construction it then placed on the constitution of Mississippi was the true one, but that it conformed to the construction upon which the legislature of the State had acted, and that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the time when this contract was made; and that as late as the beginning of the year 1841, when *Groves v. Slaughter* was decided, it did not appear, from any thing before the court, that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the State.

Acting under the opinion thus deliberately given by this court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.<sup>1</sup>

But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For, if such a rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory.<sup>2</sup>

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<sup>1</sup> APPLIED. *Pease v. Peck*, 18 How., 599. DISTINGUISHED. *Nesmith v. Sheldon*, 7 How., 818; *Gelpcke v. City of Dubuque*, 1 Wall., 214. CITED. *Luther v. Borden*, 7 How., 58. And see *Dred Scott v. Sandford*, 19 How., 603.

<sup>2</sup> APPLIED. *Ohio Life Ins. &c. Co. v. Debolt*, 16 How., 432. APPROVED. *Douglass v. County of Pike*, 11 Otto, 686. DISTINGUISHED. *Fairfield County v. Gallatin*, 10 Otto, 53.

We are of opinion, therefore, that the decision in the case of *Groves v. Slaughter* must rule this case, and consequently that the judgment of the Circuit Court must be reversed.

\*The same judgment must also be given in the other case before us between the same parties, as it depends [\*140 on the same principles.

Mr. Justice DANIEL dissented.

From the decision of the court pronounced in these causes, I feel myself constrained to dissent. The rule heretofore announced and uniformly observed by this court, with respect to the construction to be given to the constitutions and statutes of the several States, has been this:—that the interpretations put upon those constitutions and statutes by the supreme tribunals of the States respectively, should be received and followed as the true interpretation. This rule, so reasonable in itself, so inseparable from every idea of the competency, or indeed the very being of the systems of which those constitutions and statutes make an essential part, is not even now denied; but whilst it is, in general terms, assented to in the decision of these causes, it is in effect, if not in terms, by the same decision utterly overthrown. In the case of *Groves et al. v. Slaughter*, 15 Pet., 449, this court, as it was constrained to do in the absence of any interpretation by the State courts, gave its own construction to the constitution of Mississippi. Since the decision in *Groves v. Slaughter*, decisions of the Supreme Court of Mississippi, giving an interpretation to the constitution of that State, have become generally known,—they are familiar, unequivocal, uniform, numerous. That any or all of these expositions may have been made posterior to the decision of the cause of *Groves v. Slaughter*, I hold to be perfectly immaterial, so far as this circumstance can affect their force and validity. If these expositions establish the meaning of the constitution of Mississippi, such meaning must have relation to the period of the consummation of that instrument. The constitution has always been the same thing from the time of its adoption. It could not have been some other thing than the constitution, because it had not been interpreted to this court, and subsequently have become the constitution merely because its interpretation was then generally declared. The decision of the causes now before this court gives to the constitution of Mississippi different meanings at different periods of its existence, and deduces those meanings from circumstances wholly unconnected with the intrinsic signification of the terms of the instrument itself. Such a rule of interpreta-

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tion involves, in my view, a contradiction which I am wholly unwilling to adopt.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this \*141] court, that the judgment \*of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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BENNET R. TRULY, COMPLAINANT AND APPELLANT, v.  
 MOSES WANZER, JABEZ HARRISON, AND JOHN R.  
 NICHOLSON.<sup>1</sup>

The preceding case of *Rowan and Harris v. Runnels* reviewed and confirmed. The general principle with regard to injunctions after a judgment at law is this,—that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment.<sup>2</sup>

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<sup>1</sup> See further decision in this case, 17 How., 584.

<sup>2</sup> RELIED ON. *Humphreys v. Leggett*, 9 How., 313. CITED. *Crim v. Handley*, 4 Otto, 558. See also *Moore v. Clopton*, 22 Ark., 125, 128; *The Elmira*, 16 Fed. Rep., 138.

The person praying for an injunction against the enforcement of a judgment, must show a clear case of diligence on his part, and that the judgment was not the result of his inattention. *Robuck v. Harkins*, 38 Ga., 174; *Bateman v. Willoe*, 1 Sch. & L., 201; *Slack v. Wood*, 8 Gratt. (Va.), 40; *Stilwell v. Carpenter*, 59 N. Y., 414. The object of the injunction is to prevent the person having obtained the judgment from taking the benefit of an unfair advantage, resulting from accident, fraud, mistake, or otherwise, the enforcement of which is against conscience. *Little v. Price*, 1 Md. Ch., 182; *Stanton v. Embry*, 46 Conn., 595;

*Pearce v. Olney*, 20 Conn., 544; *Wingate v. Haywood*, 40 N. H., 437; *Wright v. Eaton*, 7 Wis., 595; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Ableman v. Roth*, 12 Wis., 81; *McCann v. Oteo*, 9 Neb., 324; *Bently v. Dillard*, 6 Ark., 79; *Conway v. Ellison*, 14 Ark., 400.

A judgment to which there is no good defence, or that is not contrary to equity or against conscience, will not be enjoined. *Hazletine v. Reusch*, 50 Mo., 50; *Ableman v. Roth*, 12 Wis., 81.

An injunction to a judgment at law for the purchase-money of land, on the ground of the difficulty of obtaining a title from the infant heirs of the vendor, cannot be supported if the purchaser neglected to pay the money in the lifetime of the vendor, and to demand a conveyance from him, and if the heirs are not made parties to the bill. *Prout v. Gibson*, 1 Cranch, C. C., 389. If the vendor is unable to



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Hence, where a party had remained for ten years in the undisturbed enjoyment of the property which he purchased, it was no ground for an injunction to stay proceedings for the recovery of the purchase money, to say that the original purchase was void by the laws of the State, but that he had neglected to urge that defence at law, or to say that he had heard that some persons unknown might possibly at some future time assert a title to the property.

Such an injunction, if granted, must be dissolved.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The facts in the case are sufficiently set forth in the opinion of the court.

The case was argued by *Mr. Crittenden*, for the appellant, and *Mr. Coze*, for the appellees.

Mr. Justice GRIER delivered the opinion of the court.

It is not easy to apprehend or appreciate the grounds upon which the complainant in this case has invoked the aid of a court of chancery.

He purchased some negroes from one Herbert, in 1836, to whom he gave two notes in payment. On one of these, suit was brought and a judgment obtained, which has been paid and satisfied. The other remains unpaid, but the complainant has been summoned as garnishee of Herbert in a suit by Wanzer and Harrison, in which a judgment has also been obtained, and an execution issued; and he now asks the interposition of a court of equity, not only to protect him from the judgment and execution, but also to restore to him that portion of the consideration which has been recovered by due course of law.

The reasons alleged for this request are, first, because the negroes purchased by him were brought into the State of Mississippi for sale contrary to the provisions of the constitution of the State; and therefore the contract was illegal and void. And, \*secondly, because he has been informed [\*142 that the vendor had not a good title to the negroes, but held them as guardian for his infant brothers and sisters, "and ran them off to the State of Mississippi." As the complainant still retains the undisturbed possession of the property without even a threat of molestation, this allegation would

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convey, it is unconscionable in him to enforce the payment of the purchase-money until he is able to convey, and such an inability is good ground for the vendee to apply to Chancery to enjoin the vendor from enforcing pay-

ment. *Fishback v. Williams*, 3 Bibb, (Ky.), 842; *Hilleary v. Crow*, 1 Har. & J. (Md.), 649; *Buchanan v. Lorman*, 3 Gill (Md.), 51; *Stroder v. Patton*, 1 Marsh. Dec., 228.

seem to have been inserted in the bill not as containing in itself different grounds for an injunction, but rather to give some plausibility to the charge of fraud and thus veil the naked deformity of his case.

That a note, given for the purchase of negroes brought into the State of Mississippi after 1833 (when the constitution was adopted), and before 1837 (when the legislature imposed penalties to enforce the constitutional prohibition), was not void, has been decided by this court in the case of *Groves v. Slaughter*, 15 Pet., 449, and again at the present term in the case of *Rowan & Harris v. Runnels*.

But even if the alleged illegality of the contract would have constituted an available defence to the payment of note, it would be a strange abuse of the functions of a court of equity to grant an injunction against the recovery of a judgment at law, because a purchaser with a full knowledge of his defence had omitted or was ashamed to urge it.

It may be stated as a general principle, with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. See 2 Story, Eq. Jur., § 887.

It is too plain for argument that none of these conditions can be predicated of the present case.

The complainant has had the undisturbed enjoyment of his purchase, without challenge of its title, for ten years; and it is with a bad grace that he now invokes the aid of a court of equity to shield him from the payment of the consideration, on the allegation that he had neglected to urge an unconscionable defence, or that he had heard that some persons unknown might possibly at some future time assert a claim to the property. It is in vain to search the annals of equity jurisprudence for a precedent of an injunction granted on such bald pretences.

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate

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remedy in damages. The right must \*be clear, the injury impending, and threatened so as to be averted [\*143 only by the protecting preventive process of injunction." *Baldw.*, 218. It never should be permitted to issue where it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their just demands.

Let the judgment of the Circuit Court be affirmed.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

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#### CHRISTOPHER FORD, APPELLANT, v. ARCHIBALD DOUGLAS, MAXWELL W. BLAND, AND EMELINE, HIS WIFE, APPELLEES.

By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside.<sup>1</sup>

The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below.

But if the court below should perpetuate the injunction, upon the defendants' refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve these rights to the creditor it goes too far, and the judgment of the court below must be reversed.

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<sup>1</sup> For a similar statement of the law, as applicable to Louisiana, see *Tufts v. Tufts*, 3 Wood. & M., 456, 494. The well-known rule is that property fraudulently conveyed may be levied upon under an execution and sold. *Mandlore v. Benton*, 1 Ind., 39; *Harrison v. Krammer*, 3 Iowa, 543; *Clark v. Chamberlain*, 13 Allen (Mass.),

257; *Trask v. Green*, 9 Mich., 358; *Gorham v. Wing*, 10 Mich., 486; *Stancill v. Branch*, Phill. (N. C.) L., 306. So the proceeds of a fraudulent assignment may be levied upon. *Carville v. Stout*, 10 Ala., 796; *contra*, *Henderson v. Hoke*, 1 Dev. & B. (N. C.) Eq., 119.

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THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of equity.

As the merits of the case were not involved in the decision of the court, it will only be necessary to give such a narrative of the facts as will illustrate the points of law upon which the decision turned.

On the 24th of November, 1837, James S. Douglas, of the State of Louisiana, made his last will and testament, as follows :—

I, James S. Douglas, of the parish of Concordia, and State of Louisiana, being feeble in body, and knowing the uncertainty of this life, but of sound and disposing mind and memory, do make and publish this my last will and testament.

First. I direct that all my just debts be paid as soon after \*144] my \*decease as my executors shall realize the same from the real and personal estate intrusted to their care and management.

Secondly. Reposing the utmost confidence in my beloved wife, Emeline Douglas, I hereby constitute and appoint her executrix, and my brother, Stephen Douglas, and my friend, Passmore Hoopes, executors of all my estate, real and personal, lying and being in the State of Mississippi.

Thirdly. I also appoint my brother, Stephen Douglas, and my friend, Passmore Hoopes, executors of all my estate, real and personal, lying and being in the said State of Louisiana.

In witness whereof, I have hereunto set my hand and seal, this twenty-fourth day of November, one thousand eight hundred and thirty-seven.

Signed,

JAMES S. DOUGLAS. [SEAL.]

This will, being duly attested, was admitted to probate in Mississippi on the 25th of December, 1837, and letters testamentary granted. It is not necessary to follow the proceedings in Mississippi further.

In 1838, May 26th, in the State of Louisiana, before Richard Charles Downes, parish judge in and for the parish of Madison, *ex officio* judge of probates, came Stephen Douglas, presented his petition, setting forth the death of his brother, James S. Douglas, as happening in November, 1837; that he made his last will and testament, wherein he appointed the said Stephen Douglas and Passmore Hoopes testamentary executors of his estate in Louisiana; that probate of the will had been made in Claiborne county, Mississippi; therefore,

praying letters in pursuance of the testament, and an inventory; whereupon, the judge ordered that, upon probate of the testament, an inventory be taken.

On the 30th of March, 1839, the will was proved in Louisiana, as it had before been in Mississippi. Amongst other claims against the estate, Stephen Douglas, the executor, filed an account, claiming a debt due to him of \$53,150.42.

On the 31st of October, 1839, Emeline Douglas, the widow, was appointed guardian of her four children, and Archibald Douglas, a younger brother of Stephen, was appointed under tutor or guardian. A family meeting was called, and attended the parish judge, which advised the sale of the plantation and slaves, implements, cattle, &c., at the head of Lake St. Joseph's, to satisfy the balance due to Stephen Douglas, the executor.

The sale was accordingly ordered by the parish judge, and took place on the 23d of March, 1840, when Mrs. Emeline Douglas and Archibald Douglas became the purchasers.

On the 1st of April, 1840, Emeline Douglas obtained a judgment in her favor against the estate for \$76,634.74, and, on the 22d of April, the parish judge ordered another sale to take place for the purpose of paying this debt.

\*On the 8th of June, 1840, the parish judge made sale of a plantation called Buck Ridge, slaves, cattle, [\*145 corn, &c., all of which belonged, jointly, to James S. Douglas, the deceased, and Stephen Douglas, the executor. This property was purchased by Emeline Douglas and Archibald Douglas for \$83,000.

In December, 1840, and January, 1842, Ford, a citizen of Virginia, obtained the three following judgments against the executor, in the Circuit Court of the United States, viz.:—the one judgment obtained on the 23d of December, 1840, for \$9,180, with interest, at the rate of eight per cent per year, from the 15th of January, 1838, on one half thereof, and from 15th of January, 1839, on the other half thereof, besides costs.

Another judgment, of the 26th of December, 1840, for \$4,590, with interest at same rate from 15th of January, 1840, besides costs.

The third, of January 3d, 1842, for \$4,590, with interest at same rate until paid, besides costs,—making together \$18,360, besides interest and costs.

Executions were issued upon these judgments and levied upon the property which had been purchased by Emeline Douglas and Archibald Douglas.

On the 21st of December, 1842, Archibald Douglas, Max-

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well W. Bland, and Emeline, his wife (late Emeline Douglas), filed their bill in the Circuit Court of the United States for the Eastern District of Louisiana, against Christopher Ford and the marshal, praying for an injunction to stay further proceedings under the judgments, and that they might be quieted in their possession of the property which they had purchased.

On the 30th of December, 1842, an injunction was issued accordingly.

On the 21st of April, 1843, Ford filed his answer, in which he alleged that the proceedings under the will, as well in Mississippi as in Louisiana, were the result of fraud, collusion, and combination, in consequence of which they were null and void, and passed no title to the complainants. The answer then proceeded to set forth, with great particularity, the acts of which he complained, and concluded as follows:—

“This respondent, having answered the allegations in said petition set forth, prays this honorable court that the said petition may be decreed to be dismissed, and the injunction had and obtained in this case may be dissolved, and a judgment rendered against the said petitioners and the sureties on their injunction-bond for damages, according to law. That this honorable court make such other judgment, orders, and decrees, as may be found legal and proper, to declare void and null the sales relied on in said petition; to finally dissolve the said injunction with legal damages in favor of this respondent; to dismiss said petition and relieve this respondent from the opposition of said petitioners; \*146] to order the marshal to proceed \*to the sale of said property under the said three writs of *feri facias*, for the satisfaction of the said judgments of this respondent; and that this respondent have judgment for his costs.

And this respondent will ever pray, &c.

Signed,

CHRISTOPHER FORD.”

On the 22d of April, 1843, the following exception to the answer was filed:—

The said plaintiffs except to the answer filed by the said defendants in this behalf, because the matters and things set forth in the said answer cannot, by law, be inquired into in the present suit or proceedings instituted by the said plaintiffs. And the said plaintiffs, not admitting any of the facts or matters set forth and alleged in the said answer of the said defendants, but, on the contrary, denying and protesting against the truth of all and every part thereof, and alleging that the truth thereof cannot be inquired into in this action,

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pray that they may have the benefit of their injunction, and that the same may be made perpetual, &c.

Signed, JNO. R. GRYMES, for Plaintiffs.

And on the same day and year aforesaid, to wit, on the 22d day of April, 1842, the following agreement was filed:—

*Douglas et al. v. C. Ford et al.*

Circuit Court of the United States, Eastern District of Louisiana:—

It is agreed that this case may be set down for argument on the matters of law arising on the petition and answer, as on an exception to the answer; and that if the judgment of the court, on the matters of law, should be for the defendant, the plaintiffs may join issue on the facts, and the testimony taken in the usual manner. The plaintiffs to be at liberty, at any time before hearing, to file special exceptions in writing.

Signed, JNO. R. GRYMES, for Plaintiffs.

On the 22d of April, 1843, the cause came on for trial upon the plaintiffs' exceptions to the answer of the defendant, and on the 24th the following order of court was entered of record:—

*Monday, April 24th, 1843.*

The court met pursuant to adjournment. Present, the Honorable John McKinley, Presiding Judge; the Honorable Theodore H. McCaleb, District Judge.

*Christopher Douglas et al v. Christopher Ford et al.*

The consideration of exception filed in this case to the answer of the defendant was this day resumed before the court, the complainants not appearing either in person or by his solicitor, and F. Houston, Esq., for the defendant. Whereupon, the arguments of counsel being closed, it is ordered, adjudged, and decreed, by the \*court, that the exception of the complainants to defendants' answer be sus- [\*147  
tained, and that the defendant answer over.

*Archibald Douglas et al. v. Christopher Ford et al.*

The defendant, Christopher Ford, by his counsel, declines to answer further in this case the bill of the plaintiffs, relying and insisting on the sufficiency of the ample and conclusive answer filed by him in this cause, and the utterly null and void character of the title set up by said plaintiffs, apparent on their said bill, and the record of the mortuary

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proceedings of the succession of the said James S. Douglas, deceased. The defendant having declined to answer further in this case, and to submit it to the court to render such final decree in the case as may appear to them to be proper, it is therefore ordered, adjudged, and decreed, that the injunction heretofore awarded in this case be and the same is made perpetual; and it is further ordered, adjudged, and decreed, that the plaintiffs recover the costs of suit, without prejudice to the right of the defendant to any action he may think proper.

From this decree, Ford appealed to this court.

The cause was argued by *Mr. Bibb*, for the appellant, and *Mr. Meredith*, for the appellees.

*Mr. Bibb* examined the facts very minutely as they were presented in the record, with a view of sustaining the charge of fraud, and then proceeded.

The appellant assigns the errors following, as appellant on the record:—

1. The judge erred in sustaining the exception to the answer, and also in giving relief upon the bill; thereby, in effect, decreeing that the plaintiffs could, as complainants in equity, ask the court to aid them in consummating their unfair practice and frauds, appearing on the face of their bill and exhibit referred to as part of their bill.

2. The judge erred in adjudging that the matters of fraud and collusion, alleged in the answer of the defendant, now the appellant, were not defences competent, fit and proper, legal and equitable, to be inquired into in the suit prosecuted by the plaintiffs, now appellees.

3. The court erred in sustaining the bill, and in giving any relief to the complainants upon the bill.

4. The court erred in the nature and extent of the relief given to the said complainants.

5. Upon the face of the bill and exhibit referred to, as the evidence of the title claimed by the plaintiffs, it appears that the plaintiffs had no title, had not capacity to become purchasers, that they had paid no consideration, and that the proceedings in the parish court were had, done, and procured by fraud and collusion, and combination between the said \*148] Emeline and Archibald Douglas, \*Stephen Douglas, the executor of the will and testament of James S. Douglas, and others, with intent and for the purpose of delaying, hindering, and defrauding the creditors of said testa-



tor, James S. Douglas, and Christopher Ford in particular; and therefore the bill should have been dismissed.

6. Upon the bill and transcript of the proceedings in the Parish Court of Madison, Louisiana, exhibited by the plaintiffs in the court below, as the evidence of their title, it appears that the title pretended by the said plaintiffs is invalid, prohibited by the policy of the law, denounced and interdicted by the principles of equity; and therefore the bill should have been dismissed.

7. The bill does not contain any equity; made no case proper for the aid of a court of equity.

Having set forth the facts which are relied on in the answer, most of which are proved by recorded proceedings in the two courts respectively,—the court of probate, in Mississippi, and the parish court of Louisiana,—it remains to inquire whether these matters of fact were admissible defences for the defendant against the bill and relief prayed.

The property levied upon by the marshal was confessedly of the estate of the testator, James S. Douglas, at the time of his death, and liable to the satisfaction of the executions against Stephen Douglas, executor of James S. Douglas, unless the complainants, Emeline Douglas, one of the testamentary executors, now Emeline Bland, and Archibald Douglas, they being the tutrix or guardian and under-guardian of the infants, have, by color of the sales and purchases had and contrived by fraud and collusion, and without ever making payment, under their collusive fraudulent doings, changed the title, and are above the powers of a court of equity in relation to the frauds.

At the threshold these questions are presented:—Does a report that a person was the best bidder for lands and slaves at public auction, advertised for sale for cash, change the title and vest it in the bidder, without any report of payment of the price, without any receipt for the purchase or evidence of payment, without payment made, and without ability in the bidder to make payment of the price? Does the report of a sale of lands and slaves, as having been made by a parish judge in the State of Louisiana, to a bidder at the price of \$83,000, shield and defend the bidder from all inquiries as to his fraud, collusion, art, and part in procuring a fraudulent judgment and order of sale; and also as to the facts of non-payment of the purchase money, his inability to pay, and that the bidder had never been let into possession?

The complainants, Archibald and Emeline, to maintain their bill, and their exception to the answer of the defendant,

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Christopher Ford, are under the necessity to assert the affirmative of these propositions.

\*[149] The record of the proceedings in the parish court of Louisiana, offered by complainants in equity as evidence of their title to the property levied upon by the marshal to satisfy the executions, contains no report of the payment of the prices which they bid; the complainants offer no proof of payment; their bill does not allege payment; the sum was above their circumstances and ability to pay in cash; the record abounds with evidence of fraud and collusion; the answer charges, that the design, end, and aim of the whole proceeding to judgment and sale was by a sham sale and colorable purchase, to protect the property from the creditors of the testator, whilst Stephen Douglas yet is the possessor of the estate as before the pretended sale. The transcript of the proceedings in the probate court of Claiborne county, Mississippi, corroborates and multiplies the acts of fraud and collusion; and the averments in the answer of Christopher Ford, if true, leave no room to doubt the fraud.

Shall these pass without inquiry, without examination, without trial, upon a bill brought by two of the confederates in the fraud and collusion, asking a court of equity to call its moral powers into activity to protect them and their confederate in the fruits of the fraud?

By the exception to the answer, and the decision of the judge below, the frauds are said not to be proper subjects of inquiry "in the present suit or proceedings instituted by the said plaintiffs."

The exception, as taken and sustained, implies that the matters and things set forth in the answer may be inquired into in some other suit, in some other proceeding.

Does the attitude of Mrs. Douglas and Archibald Douglas, as complainants in equity, ensconce them from reprobation for having art and part in the fraudulent and covinous proceedings which they make the groundwork and gravamen of their accusations and prayer for relief? The maxim in equity is, a complainant must come into the court with clean hands.

I propose to comprise my argument, as to the principles of law and equity which should rule the decision of this appeal, under these general heads:—

1. The effect of fraud in contaminating and avoiding all proceedings and acts, as well semi-judicial as judicial, had and done, contrived and procured, by fraud.

2. That the jurisdiction of the courts of the United States, to carry into execution and full effect their judgments and decrees, is plenary; and that the jurisdiction of the court of

the United States, to execute the judgments in favor of said Ford, the appellant, is not to be remitted and referred to the tribunals of the State of Louisiana, to give him execution and satisfaction of these judgments.

3. That, upon the face of the transcript of the proceedings in the parish court, as exhibited by the plaintiffs, now appellees, they \*were incapable, and prohibited by the policy of the law, and the established principles of [\*150 equity, to become purchasers at the sales therein mentioned, and by their own showing have not the title to the property mentioned in their bill.

I. As to the effect of fraud.

Lord Chief Justice De Grey, in delivering the answer of the judges to a question put to them in the *Duchess of Kingston's case*, expressed the opinion of the judges thus:—"Fraud is an extrinsic, collateral act, violating the most solemn proceedings of courts of justice; as Lord Coke says, avoiding all judicial acts, ecclesiastical and temporal." *The Duchess of Kingston's case*, 20 Harg. State Trials, 602 (Cobbett's ed., 594).

A decree of exchequer, that a will was duly proved which was obtained by fraud, relieved against in chancery, by Lord Hardwicke. *Barnsley v. Powel*, 1 Ves. Sr., 120; and *Id.*, 286, 287.

Where a fine and non-claim is levied by fraud, a court of equity will relieve against the fine; *per* Lord Hardwicke. *Cartwright v. Pultney*, 2 Atk., 381.

An original bill to set aside a decree obtained by gross fraud, sustained by Lord Chancellor Macclesfield. *Loyd v. Mansell*, 2 P. Wms., 74, 75.

At law, defendant may plead that the judgment against his testator was by fraud and covin. If a decree was by fraud and covin, the party may be relieved against it; not by rehearing or appeal, but by original bill. By Lord Hardwicke, chancellor. *Bradish v. Gee*, Amb., 229.

"Equity has so great an abhorrence of fraud, that it will set aside its own decrees, if founded thereon." 13 Vin. Abr., *Fraud* (Aa.), pl. 9, 10, p. 543.

"Equity will never countenance demands of an unfair nature; in this case it was to have an allowance for attending at auctions to enhance the price of goods; nor will equity suffer them to be set off against fair and just demands; and a cross bill for that purpose was dismissed with costs." 13 Vin. Abr., p. 544, pl. 13.

In chancery, between Richard Fermor, plaintiff, and Thomas Smith, defendant, to set aside a fine levied by said Smith, by

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fraud and covin, to bar the plaintiff of his inheritance. The proclamations and five years had past; Smith, the tenant for years, all the time continuing in possession, and paying rent until his term expired, and then he claimed the inheritance, and to bar the plaintiff by force of the said fine and proclamations and five years. On the hearing of the case, the Lord Keeper of the Great Seal, because it was a case of great importance, and considering that fines with proclamations were general assurances of the realm, referred the case to all the justices of England and the barons of the exchequer, all of whom met (except two) and consulted, and resolved that the plaintiff was not barred, because of the fraud and \*151] covin. And it was \*said that the common law "doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet, being mixed with fraud and deceit, are in judgment of law wrongful and unlawful." And various examples and precedents of decisions are cited. *Fermor's case*, 3 Co., 77, 78.

Chancellor Kent, in the case of *Reigal v. Wood*, 1 John. (N. Y.) Ch., 406, said,—“It is a well settled principle in this court, that relief is to be obtained, not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition.”

In the case of *Kennedy v. Daley*, 1 Sch. & L., 355, Chancellor Redesdale relieved against a decree obtained by fraud and imposition, and declared it should have no effect. And that a fine levied and non-claim, by a trustee to a person having notice of the trust, shall not bar the *cestui que trust*.

And in the case of *Giffard v. Hort*, Id., 386, he held a decree, obtained without making parties of those persons who were known to have rights in the estate, to be fraudulent and void as to those not made parties, and a purchaser under the decree, with notice of the defect, not to be protected by it. The fraudulent decree was in the exchequer. Lord Redesdale laments numerous proceedings in the exchequer, at a time when that court was oppressed with business, and could not take time for full investigation and right decision, whereby advantage was taken by such proceedings to defraud persons of property to which they were entitled. “It was one of the crying grievances of time. A systematic use has been made of the decrees of a court for the purpose of effecting fraud; and it has been as much a swindling contrivance to deprive a family of its estate, as any of those contrivances which swindlers practise upon unwary young men. I shall, therefore, think myself bound to struggle to the utmost of

my power to relieve against such oppressive combinations." *Giffard v. Hort*, 1 Sch. & L., 396.

Certain it is that distant creditors, legatees, and heirs have had as ample cause to lament that a systematic use has been made of the parish courts of Louisiana for effecting fraud and swindling, as Lord Redesdale had for lamenting such like uses made of the court of exchequer in Ireland.

The cases which I have cited show the active relief given upon bills to annul those fraudulent judicial proceedings. The courts of equity, true and consistent to the doctrine that "all acts, as well judicial as others, mixed with fraud and deceit, are in judgment of law wrongful and unlawful," have ever refused to grant any relief to a party who comes into a court of equity as plaintiff, asking to have advantage of fraudulent or unfair proceedings.

The maxim in equity is,—“He that hath committed iniquity shall not have equity.” Francis’s Maxims, II. (old ed. p. 5, new ed. p. 7).

\*Under that maxim, various examples are given of plaintiffs whose suits were dismissed because the sub- [\*152  
jects of the bill were founded in fraud or unfair dealing.

The plaintiff upon a loan of £90 got a bond for £800, and had judgment. Thereupon he brought a bill to subject to the satisfaction of the debt certain lands of the defendant in right of his wife, estated to trustees for her benefit. “But the security being gotten from the defendant when he was drunk, the lord keeper would not give the plaintiff any relief in equity, not so much as for the principal he had really lent, and so the bill was dismissed.” *Rich v. Sydenham*, 1 Cas. in Ch., 202.

Upon a bill to have the benefit of articles of marriage, which had been reduced to writing but not sealed, containing an extreme portion for the married daughter, more than would be left to her father and mother, and two other daughters not provided for, the lord chancellor would not decree the agreement, but left the plaintiff to recover at law if he could. *Anonymous*, 2 Cas. in Chan., 17.

To sustain the exception to the answer, or to give relief upon the bill without an answer, upon the idea that the fraud was not a fit subject of inquiry upon a bill by the actors, contrivers, and participators in the fraud and covin, was in contradiction to the established principles of equity.

The complainants having brought their case into the court of equity for relief, it was open to every defence, to every objection which could have been made against it by a bill, on behalf of those prejudiced by the proceedings in the parish

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court, to have relief against the fraud and covin. If the Circuit Court of the United States had jurisdiction to hear and determine the complaint as a matter cognizable in equity, it had jurisdiction to hear and determine the defence to the bill alleging the acts of fraud, collusion, and covin, charged in the answer, which, if true, avoided the proceedings relied upon as the foundation of the bill.

The cause which had moved the complainants to come into equity for relief did not curtail the powers and jurisdiction of the court to hear and determine any and every equitable defence to the bill. Fraud, covin, and collusion in the plaintiffs, had and used in the proceedings on which they relied, was an equitable defence, a bar to the relief prayed by the bill.

That the judgment creditor, C. Ford, the defendant, had caused the marshal to levy the executions upon the property alluded to in the proceedings in the parish court, as exhibited by the complainants, neither purged the proceedings of the fraud, covin, and collusion, nor deprived the Circuit Court of the United States of its powers, duties, and dignity as a court of equity.

The powers and jurisdiction of the Circuit Court of the United States were prescribed and conferred by the constitution and laws \*of the United States, not by the will \*153] and convenience of the complainants in that bill.

Are the proceedings of the parish court of Madison, in the State of Louisiana, final and conclusive against all persons, parties, and those not parties? Are the frauds by which those judgments in favor of the executor, Stephen Douglas, and in favor of Mrs. Emeline Douglas, and the fraudulent, collusive, and covinous proceedings under those judgments, final, conclusive, sacred; beyond the power of all courts to overhaul them for fraud, deceit, and covin? No such sanctity can be ascribed to them.

Being liable to be impeached and avoided for fraud and covin, the complainants, who have carried a transcript of those proceedings into the Circuit Court of the United States, and therein made those proceedings the *substratum* of their bill in equity and prayer for relief, have thereby subjected those proceedings to the examination in that court, sitting as a court of equity.

But such jurisdiction of the Circuit Court did not depend upon the volition of the said Archibald and Emeline.

II. The jurisdiction of the courts of the United States, to carry into execution and full effect their judgments and de-

crees, is plenary; not to be remitted and referred to the tribunals of the States.

The jurisdiction of the Circuit Courts of the United States in each particular case is not exhausted by the rendition of the judgment or decree, but continues until that judgment or decree shall be satisfied. The beneficial exercise of the jurisdiction of the court to compel satisfaction is not less important than the exercise of the jurisdiction to pronounce the judgment or decree. The jurisdiction to enforce satisfaction by execution is a necessary incident to the jurisdiction to give the judgment or decree; it is expressly given in the acts of Congress establishing the courts and defining their jurisdiction. The execution and satisfaction of the judgment is the very "life of the law."

But I need not labor this point; the doctrine is well settled by the decisions of the Supreme Court of the United States. *Wayman v. Southard*, 10 Wheat., 23; *Bank of the United States v. Halstead*, Id., 64.

The learned counsellor, who argued this case for the appellees, cited many decisions of the State court of Louisiana, and passages of the civil code of Louisiana, to show that an execution, issuing from a State court of Louisiana, could not have been levied upon this property until, by some proceeding, the orders, judgments, and sales by the parish judge of Madison had been reversed, set aside, and annulled. The drift of that argument, and the exception taken to the answer of Ford, and the opinion of the judge in sustaining the exception, all seem intended to drive C. Ford into the State courts of Louisiana, to seek satisfaction of his judgments rendered in the \*Circuit Court of the United States, [\*154 to confine the process of execution to the mode of proceeding under the law of that State.

To all those arguments and citations, I reply, that the State of Louisiana has rightful authority to regulate her own courts and modes of executing their judgments, but has no rightful authority to regulate the modes of proceeding and processes of execution of the courts of the United States.

The jurisdiction of the courts of the United States, and the process of execution of their judgments and decrees, depend upon the constitution of the United States, and the laws made by Congress in pursuance of the constitution, not upon the laws of the States. The laws made by Congress in pursuance of the constitution "shall be the supreme law of the land, any thing in the constitution or laws of any State to the contrary notwithstanding." So the constitution of the United States (art. 6, § 2) declares.

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Any law of the State contrary to the law of the United States, or impliedly or expressly prohibiting the execution of the process of the courts of the United States within the State, in a manner different from that prescribed by the law of the State to her own courts, would be null and void.

The differences between the process of execution of the judgments of the courts of the United States, as regulated by the laws of the United States, and the process of execution of the judgments of the State courts as regulated by State laws, have been the subjects of solemn argument, matured consideration, and decision in the Supreme Court of the United States.

In the cases of *Wayman v. Southard*, 10 Wheat., 1; *The Bank of the United States v. Halstead*, Id., 54; *Suydam v. Broadnax*, 14 Pet., 67, the laws of the United States regulating the process and modes of executing the judgments of the courts of the United States were considered, expounded, and adjudged.

In the two former, the certificates of the decisions and mandates expressly declare,—“That the statutes of Kentucky in relation to executions, which are certified to this court, are not applicable to executions which issue on judgments rendered by the courts of the United States” (10 Wheat., 50); “cannot operate upon, bind the mode in which the *venditioni exponas* should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three fourths of its value.” 10 Wheat., 65.

The decision in *Suydam v. Broadnax* declared, that the law of the State of Alabama, which commanded that claims of creditors upon an estate declared to be insolvent should be prosecuted before the commissioners appointed to manage the estate, has no binding force whatever on the Circuit Courts of the United States; and the right of said Circuit Courts to take cognizance of claims against such an estate was undoubted, the statute of Alabama to the contrary notwithstanding. 14 Pet., 67.

\*155] The judicial department of the government of the United States, in relation to the extent of its jurisdiction, the distribution of its powers between the Supreme Court and the inferior courts, the supervising power over the decisions of the State courts in specified cases, the tenures of office of the judges, the provision for the adequate support of the judges, their responsibility, and the mode of appointment, was constructed with great wisdom, caution, and deliberation. Profiting by history and examples of the past, the sages who framed the judiciary department looked to the



future with anxious desire to preserve the Union, to maintain peace at home and abroad, so far as an impartial and enlightened administration of justice can conduce to those ends. Considerations of the highest importance demand that the supremacy of the laws of the Union, and the judicial cognizance assigned to the courts of the United States, shall be maintained in their full extent and proper vigor.

The jurisdiction in controversies between citizens of different States, and in questions of conflict of State laws with the constitution and laws of the United States, forms an important provision for establishing justice and preserving domestic tranquility. Past experience of "fraudulent laws, which had been passed in too many of the States" before the federal constitution was proposed, taught the framers of that compact to apprehend that the spirit which had produced those would, in future, produce like instances, or assume new shapes with like evil tendencies; therefore the constitution established particular guards against such evils, one of which is the jurisdiction of the federal courts in controversies between citizens of different States. Multiplied instances, which have occurred since the federal constitution was adopted, attested by the records of this court, prove but too well that the apprehensions of the framers of the constitution were not idle, nor their foresight and prudent provisions for arresting the evils unprofitable.

III. Upon the bill and the transcript of the proceeding in the parish court, exhibited thereby to make title to the property claimed by the complaints, now appellees, by their own showing they have not the title to the property.

They, said Emeline and Archibald, were in a fiduciary capacity, the one as tutrix (or guardian), the other sub-tutor (or under-guardian), and therefore not capable in law to become purchasers at those sales.

The purchase money was not paid; no possession was delivered; the whole contrivances of debts claimed against the estate of her testator, the judgments in favor of Stephen Douglas and of said Emeline, respectively, were false, fraudulent, and covinous; the sales and pretended purchases were shams, simulations, deceitful, illegal, and passed no title to the said Emeline and Archibald.

Upon this point I cite the case decided at the last term of this court. *Michoud et al. v. Girod et al.*, 4 How., 553-555, &c.

\*That opinion is drawn with such perspicuity, research, and demonstration, that nothing is left to be supplied by me. [\*156

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It is of itself an example of overhauling and relieving against the iniquities committed by the court of probate and parish court of Louisiana, in proceedings similar to those of the parish court of Madison relied on by the complainant.

The incapacity of the tutor, or guardian, to purchase at such a sale is one of the points adjudged in that case.

I have labored this case because of the value in controversy, but more on account of the consequences in all time to come, for good or for evil, which hang upon the decision of this appeal in this way or in that. Many things I have said which might perhaps have been well omitted. Some things I have intentionally omitted which might have been said, which will be supplied by the intelligence of the court. But, *ex dictis, et ex non dictis*, I pray the decree of this court for the appellant; that the injunction be dissolved and the bill dismissed, so that the appellant may have execution of his judgments.

*Mr. Meredith*, for the appellees.

Upon the facts disclosed by the record, the counsel for the appellees, in the oral argument which he had the honor of addressing to the court, when the case was called in its order upon the calendar at the present term, submitted two propositions which he respectfully insisted were fully sustained by an uniform series of decisions of the Supreme Court of Louisiana, establishing them as fixed rules of property in that State. They were the following:—

1. That the appellees, at the time the executions were levied, were possessed of the property seized, under and by virtue of judicial sales, translativ of title, as by public and authentic act.

2. That the appellees being so possessed the appellant had no right, on a suggestion of fraud, to treat the proceedings of the probate court as null and void, and cause his executions to be levied on the property; but that the fraud alleged by him could only be inquired into in an action to set aside the sales, under which the appellees claimed the possession and title; in which, if he should succeed, the property would become liable to the operation of his judgments. Until when, the appellees had a right to be protected by injunction in the possession and enjoyment of the property.

- I. Upon the first proposition, as to the legal effect of the adjudications of the probate sales upon the title and possession, the counsel for the appellees referred to the following decisions:—*Zanico v. Habine*, 5 Mart. (La.), 372; 1 Cond. Rep., 384; *Bushnell v. Brown*, 8 Mart. (La.) N. S., 157; 4

Cond. Rep., 466; *Marigny v. Nivet*, 2 La., 498; *De Ende v. Moore*, 2 Mart. (La.) N. S., 836; 2 Cond. Rep., 675; *La Fon's Executors v. Phillips*, 2 Mart. (La.) N. S., 225; 2 Cond. Rep., 644. \*These cases all concur to show that in judicial sales the *proces verbal* is sufficient evidence of title; [\*157 and that neither deed from the officer making the sale, nor act under the signature of the parties, is necessary to perfect it. Such indeed are the express provisions of the Civil Code. See articles 2,586, 2,594, 2,601.

Further, the adjudication, being by public and authentic act, was complete evidence of delivery and possession, where there was no adverse possession at the time of the sale. Such a possession is no where alleged or suggested in this case, and could not indeed have existed, because all the parties in interest were before the court when the decrees were made by the court of probates, as appears by the transcript of the record exhibited with the bill. The bill itself avers that the appellees were in possession long before the issuing of the executions; and the only denial of the answer is as to the lawfulness of the possession. Upon this point, the case of *Fortin v. Blount*, 1 Mart. (La.) N. S., 179, 2 Cond. Rep., 429, was referred to.

The first proposition then appeared to be clearly sustained under the Louisiana jurisprudence; that is to say, that the appellees were in possession of the property upon which the appellant's executions were levied by adjudications which passed the title to them.

II. The second proposition, it was contended, was equally clear upon authorities. It is held as settled, in the courts of Louisiana, that no man can take the law into his own hands, and, *ex mero motu*, undertake to render himself justice; that, however good his title may be, he cannot take possession of property without form of law; and that the courts will not, in a possessory action, investigate his title, but will restore the possession, and leave him to his petitory action. It is equally well settled, that what one cannot do by himself, he shall not be permitted to do through the instrumentality of a mere ministerial officer,—such as a sheriff or marshal,—acting under his directions and orders, and under pretence of judicial authority, disturbing third parties in the possession and enjoyment of their property, leaving them to the uncertain and inadequate remedy of action for the trespass, against the officers, or to follow the execution creditor, perhaps into a distant State, in quest of satisfaction. If such creditor believes that the title of the party in possession is founded in fraud, and that the property is liable to his execution, the

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law imposes upon him the duty of bringing his revocatory action to annul the title and subject it to the satisfaction of his judgment. This he is bound to do first; he cannot forestall or provoke the inquiry by a seizure under execution; and should he attempt to do so, the courts will enjoin the proceeding. This principle has its foundation in the Roman and Spanish laws, and has been the established jurisprudence in Louisiana from the earliest period, and is free from all doubt and conflicting decisions. It imposes no hardship on \*158] the plaintiff in the execution, because a \*revocatory action for cause of fraud is one of the plainest and most simple remedies in practice in the courts of that State; in which, if the plaintiff succeeds, the sale is avoided, and the property restored and subjected to his claim. In such an action the parties are entitled to a jury. If the judgment be in a court of the United States, and the creditor prefer that jurisdiction, it is submitted that a bill on the equity side would afford every relief that his case could require.

In support of this proposition and these views, the counsel for the appellees referred to the following decisions:—*St. Avid v. Wiemprender's Syndics*, 9 Mart. (La.), 648; 2 Cond. Rep., 39; *Barbarin v. Saucier*, 5 Mart. (La.) N. S., 361; 3 Cond. Rep., 577; *Henry v. Hyde*, 5 Mart. (La.) N. S., 633; 3 Cond. Rep., 689; *Peet v. Morgan*, 6 Mart. (La.) N. S., 137; 3 Cond. Rep., 780; *Yocum v. Bullitt*, 6 Mart. (La.) N. S., 324; 3 Cond. Rep., 858; *Trahan v. McMannus*, 2 La., 214; *Childress v. Allen*, 3 Id., 479; *Brunet v. Duvergis*, 5 Id., 126; *Samory v. Herbrard*, 17 Id., 558; *Laville v. Hebrard*, 1 Rob. (La.), 436; *Fisher v. Moore*, 12 Id., 98. In *Henry v. Hyde*, and *Yocum v. Bullitt*, above referred to, the question arose, in a case exactly like the one under consideration, where property had been seized in execution, and an injunction had been granted to the party claiming it by purchase, from or under the defendant in the execution, as the former owner. Indeed, injunction is the remedy expressly given by the law of Louisiana. Code of Practice, art. 298, no. 7.

Upon these two propositions, then, and the authorities cited, the counsel for the appellees contended that the decree of the Circuit Court perpetuating the injunction should be affirmed. The only effect of such a decree being to stay the proceedings on the appellant's executions, issued under his judgments at law, and put him to his direct action to annul the sales and subject the property to their payment.

It was, moreover, contended that these, being the established principles of State jurisprudence, must be considered as rules of property in Louisiana; and therefore, under the

repeated decisions of this court, as obligatory upon the courts of the United States as upon the State tribunals. And for this were cited 8 Wheat., 542; 12 Id., 162; 6 Id., 127; 7 Id., 550; 8 Id., 535, 542; 10 Id., 159; 11 Id., 367; 5 Cranch, 32; 9 Id., 98; 1 Pet., 360; 2 How., 619.

These were the positions and authorities on which the counsel for the appellees relied, in the argument before referred to. A printed brief, however, having since been filed, with the permission of the court, by the counsel for the appellant, he prays leave to subjoin a few additional remarks.

The greater part of this brief consists of a very labored analysis of the record of the probate court, exhibited with the bill, with \*intent to show "collusion, combination, and fraud," on the part of the executor of James S. [\*159 Douglas and the appellees, as the purchasers of the property in controversy. Whether the learned counsel has failed or succeeded in this attempt is not material now to consider, because such an investigation assumes the very question now before the court; that is to say, whether, in answer to a bill praying an injunction to restrain him from levying executions upon judgments recovered against a third person, on property the title and possession of which are alleged to be in the appellees, by purchase at a judicial sale, under decrees of a court of unquestioned jurisdiction, it is competent to the appellant to aver that such decrees were procured by "collusion, combination, and fraud." Should this court sustain such an answer, in such a proceeding, it is presumed that the case would be remanded to the Circuit Court, where the appellees will have the right, under the agreement before referred to, to join issue on those allegations in the answer, and, under a commission, take such testimony as they may deem expedient or necessary.

The learned counsel has comprised his argument under three general heads.

1. The first is as to the "effect of fraud in contaminating and avoiding all proceedings and acts, as well semi-judicial as judicial, had and done, contrived and procured, by fraud." This general principle is too indisputable to have needed the support of the numerous cases cited in the brief. If, however, the learned counsel, in stating his proposition, intended to apply the phrase "semi-judicial" to the proceedings in the probate court for the parish of Madison, it is only necessary to refer to article 924 of the Code of Practice, to show that the courts of probate in that State have exclusive original jurisdiction of all matters touching the administration of the real and personal estates of deceased persons to a

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larger extent, perhaps, than the orphans' courts of any other State of the Union. Their proceedings are, in the fullest sense, judicial, and unless reversed on appeal their decisions are conclusive and cannot be impeached collaterally, except, as all judicial acts may be, upon the ground of fraud. But though fraud vitiates all judicial proceedings, it is surely not necessary to remind the court that he who seeks to impeach a judgment of decree collaterally must show that he was neither a party nor a privy to it. If he stand in either of these relations he cannot be permitted to allege fraud in the judgment itself, or in the mode of proceeding by which it was procured. He can only do it directly by motion for a new trial, or appeal, or writ of error. *Prudham v. Phillips*, Amb., 763; *Bush v. Sheldon*, 1 Day (Conn.), 170, which was a judgment of an orphans' court; *Peck v. Woodbridge*, 3 Day (Conn.), 30, are among the numerous cases upon this point, collected in 3 Cowen's *Phillips on Evidence*, 854, note 610. It is admitted that there is no such limitation upon the operation of \*the general principle, where the party alleging \*160] the fraud is a stranger to the judgment he assails; because he has no power to reverse such judgment by appeal. But in this case the appellant was a party to all the proceedings in the probate court. The law of Louisiana makes all creditors of deceased persons parties to such proceedings. It is not necessary that they should be specially cited or summoned,—a general notice is all that is required; and the record proves that notice by advertisement was given by the judge of probates, at every stage of the proceedings, conformably to the law and practice of the State. *De Ende v. Moore*, 2 Mart. (La.) N. S., 336; 2 Cond. Rep., 679; *La Fon's Executors v. Phillips*, Id., 225; Id., 644; *Ancieuse v. Dugas*, 3 Rob. (La.), 453.

But further, the appellant was not merely a party in contemplation of law, but an actor in these proceedings. The record shows that on the 3d of May, 1841, he appeared by counsel, alleging himself a creditor, and filed an "opposition" to the homologation of the several accounts of the executor, averring them to be entirely incorrect and illegal, and praying that they might be disallowed, and that the executor should be ordered to file an amended account in which the appellant ought to be placed as a creditor for the amount of his judgments in the Circuit Court. But he neglected to support his opposition by any evidence whatever, and the court very properly overruled and dismissed it with costs. It is true that the appellant, in his answer, states that the attorney had no instructions or authority to file such a petition; and

the attorney himself acknowledges that fact. Had this disavowal been made in the probate court in proper time, supported by affidavit, the court no doubt would have noticed it. But surely it cannot be contended that it can now be made, in a collateral proceeding, and before a different tribunal. In contemplation of law, therefore, and in point of fact, the appellant was a party to the proceedings, from which he took no appeal, though the law allowed him one, but by his executions attempted, in the language of one of the cases, "to seize at once, and by short hand," property which in the progress of those proceedings the appellees had purchased under the sanction of judicial decrees. If he had taken an appeal it would have been competent for him to allege the frauds of which he now complains, and, establishing them by proof, to set aside the whole proceedings. But that he cannot do collaterally, as he has attempted in his answer.

It may be remarked, that the appellant instituted his suits in the Circuit Court, after the letters testamentary had been granted by the court of probates to Stephen Douglas, which was on the 26th of May, 1838; at all events, the judgments were subsequent to the grant of the letters. Why did he seek the jurisdiction of the Circuit Court? Not from ignorance, because he states in his answer, that he "had expressly ordered his agents to avoid the State courts altogether, for reasons sufficient, and to sue in the Federal courts [\*161 only." What reasons? The jurisdiction of the probate courts of Louisiana has been shown, and it is so exclusive that it has been repeatedly decided by the Supreme Court of that State, that creditors have no right to enforce their claims by action in any other forum. *De Ende v. Moore*, 2 Mart. (La.) N. S., 336; 2 Cond. Rep., 675; *La Fon's Executors v. Phillips*, Id., 225; Id., 644; and for this just and obvious reason, that such a right would have a tendency to defeat one of the great objects of all testamentary systems, an equal distribution of assets among all the creditors of the decedent. This was exactly what the appellant most desired to avoid. It was to overreach the other creditors,—to obtain more than his just dividend at their expense,—that, in fraud of the law of the State, he brought his suits in the Circuit Court. If he fails in the attempt, the consequences are of his own seeking. But he has still a *locus penitentie*, for, by the Civil Code of Louisiana, articles 1060, 1061, creditors who omit or neglect to present their claims are entitled, even after final distribution, to an equal dividend with those who have been more diligent; to be made up by contribution from the legatees in the first instance, and if there are none,

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or the amount of legacies be insufficient, then by the creditors who have been paid, so as to put all upon equality.

2. The second proposition of the counsel for the appellant may be safely assented to. The plenary power of the courts of the United States to carry into execution and full effect their judgments and decrees is unquestioned. Nor has any attempt been made, in this case, to "remit or refer" the judgments recovered by the appellant against the executor of James S. Douglas to the tribunals of the State of Louisiana for execution or satisfaction; or to interfere with the rightful jurisdiction of the Circuit Court over those judgments; or to claim that it should be regulated by any other process or execution than that which is prescribed by the laws of the United States for their courts. The appellees do not deny that the writs of *feri facias* issued regularly upon the judgments, and that the marshal acted regularly in the performance of his duty, according to their mandate. Their only complaint is, that in obedience, not to the writs, but to the orders and directions of the appellant, the marshal has seized and taken in execution their property, instead of the property of the defendant in the judgments; and their only claim is to have the question of property tried by the law of Louisiana; not before the tribunals of that State, if the appellant should prefer the forum which he at first selected; but if in that forum, by the law of that State, which, as it has been shown, does not permit a party to take property in execution, claimed by a third person, upon a suggestion or allegation of fraud, without first establishing the fraud by judicial decision. This the appellees respectfully insist, that they have a clear right to ask, under the provision of the thirty-fourth section of the judiciary act of \*162] 1789, in the exposition \*of which Chief Justice Marshall, delivering the opinion of the court in *Wayman v. Southard*, 10 Wheat., 25, and speaking of judgments in the courts of the United States, puts the very case in the following words:—"If an officer take the property of A. to satisfy an execution against B., and a suit be brought by A., the question of property must depend entirely on the law of the State."

3. It is lastly contended, that the appellees were incapable in law of becoming the purchasers of the property they now claim; and that, therefore, no title passed to them under the sales made in virtue of the two decrees of the court of probates. This incapacity, it is said, arose from the fact, that Emeline Douglas, who has since intermarried with Maxwell W. Bland, was at that time the tutrix of her minor children, and that Archibald Douglas, the other purchaser, was their



under-tutor, by the appointment of the court of probates. This the record itself shows, and is admitted.

It is, undoubtedly, a general rule that all *qui negotia aliena gerunt* are incapable of purchasing, for their own benefit, property in which those they represent are interested. And this not on the ground of fraud, but because the law will not allow one, sustaining the character of an agent, to create in himself an interest opposite to that of his principal. And it is admitted that this rule has been applied to executors, administrators, trustees, guardians, tutors, curators, judicial officers, and all other persons, who, in any respect, as agents, have a concern in the disposition and sale of the property of others, whether the sale is public or private, or judicial, *bona fide*, or fraudulent in point of fact.

But this rule is not inflexible. Where it is for the interests of the parties concerned, a court will permit a person, standing in any of those relations, to become a purchaser. And, therefore, it has been frequently held that a purchase made by a trustee, under judicial sanction and approbation, was not on that ground to be questioned or set aside. *Campbell v. Walker*, 5 Ves., 678; *Prevost v. Gratz*, 1 Pet. C. C., 368; *Jackson v. Woolsey*, 11 Johns. (N. Y.), 446; *Gallatin v. Cunningham*, 8 Cow. (N. Y.), 361.

So in Louisiana, where the general rule unquestionably prevails, it has been expressly held that a mother, being tutrix of minor heirs, might lawfully become a purchaser at a probate sale of property belonging to her deceased husband's succession, if sanctioned by the judge within whose jurisdiction the minors have been brought; and that this sanction may be given before or after the sale. *McCarty v. Steam Cotton Press Company*, 5 La., 16, 20.

Now the record in this case shows that both sales were preceded by family meetings, to deliberate and advise touching the interests of the minors; that they recommended the sales as necessary and expedient; that their proceedings were homologated by the judge, who thereupon ordered and decreed the sales to be made; that the property was appraised by sworn appraisers; notice of the time and place of sale regularly given; and, finally, that the sales were made by the judge of probates, *ex officio*, and in person, and by him struck off and adjudicated to the two appellees by name, they being the actual and highest bidders for prices above the appraisements. There can be no doubt, therefore, that both purchases were made with the knowledge, approbation, and sanction of the court of probates, and were recognized as valid in the subsequent proceedings of the

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succession; and, on the authority of the decision above referred to, were valid by the law of Louisiana, which, of course, must be obligatory in this case upon every other tribunal.

But further, if there had been no such judicial sanction, it is not competent to the appellant to make the objection. A purchase by a trustee, or other fiduciary, is not absolutely void, but voidable only. The heirs in this case are the *cestui que trusts*, and it is their right, and not the right of the appellant, who is a creditor only, and a creditor who has renounced all benefit under these mortuary proceedings, to call in question, or set aside, the sales made to the appellees. *Winchester v. Cain*, 1 Rob. (La.), 421; *Prevost v. Gratz*, 1 Pet. C. C., 368; *Wilson v. Troup*, 2 Cow. (N. Y.), 195, 238; Opinion of Sutherland, J.; *Davoue v. Farming*, 2 Johns. (N. Y.) Ch., 252; *Jackson v. Woolsey*, 11 Johns. (N. Y.), 446; *Harrington v. Brown*, 5 Pick. (Mass.), 519; *Denn v. McKnight*, 6 Halst. (N. J.), 385; *Gallatin v. Cunningham*, 8 Cow. (N. Y.), 379, *per* Colden, Senator.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States, held in and for the Eastern District of the State of Louisiana.

The complainants below, the appellees here, filed their bill against Christopher Ford, the appellant, and Robertson, the marshal of the district, for the purpose of obtaining injunctions to stay proceedings upon the several judgments and executions, which Ford had recovered in the Circuit Court of the United States against one Stephen Douglas, as executor of J. S. Douglas, deceased.

The judgments amounted to some \$18,000, and the marshal had levied upon two plantations, and the slaves thereon, of which the testator, J. S. Douglas, had died seized and possessed.

The bill set forth that Stephen Douglas, against whom the judgments had been recovered, neither in his own right nor as executor of J. S. Douglas, deceased, had any title to or interest in the plantations and slaves which had been seized under and by virtue of the said executions; and that the same formed no part or portion of the succession of the testator in the hands of the said executors to be administered. But that the whole of the said plantations and slaves, including the crops of cotton, and all other things thereon, were

\*164] \*the true and lawful property of the complainants; that they were in the lawful possession of the same,

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and had been for a long time before the issuing of the executions and seizure complained of; and had acquired the said property, and the title thereto, at a probate sale of all the property belonging to the estate and succession of the said testator,—which sale was lawfully made, and vested in the complainants a good and valid title. All which would appear by the *proces verbal* of the said adjudications, and the mortuary proceedings annexed to and forming a part of the bill.

An injunction was granted, in pursuance of the prayer of the bill, staying all proceedings on the judgments rendered in the three several suits, and also on the executions issued thereon against the property.

Christopher Ford, the adjudged creditor, in answer to the bill, denied the validity of the probate sales of the plantations and slaves to the complainants; and charged that they were effected, and the pretended title thereto acquired, by fraud and covin between the executor, Stephen Douglas, and the executrix, the widow of the testator, and one of the complainants, for the purpose of hindering and defrauding the creditors of the estate; that in furtherance of this design a large amount of simulated and fraudulent claims of the executor and executrix were presented against the succession, to wit, \$53,000 and upwards in favor of the former, and \$76,000 and upwards in favor of the latter, which were received and allowed by the probate court without any vouchers or legal evidence of the genuineness of the debts against the estate; that these simulated and fraudulent claims were made the foundation of an application to the said probate court for an order to sell the two plantations, and slaves thereon, under whom the widow and one Archibald Douglas became the purchasers at the probate sale; that neither had paid any part of the purchase-money to the executor or probate court; and which was the only title of the complainants to the property in question, upon which the defendant had caused the executions to be levied.

In confirmation of the fraud, thus alleged in the probate sales in the parish of Madison and State of Louisiana, the defendant further charges, that the testator died seized and possessed, also, of a large plantation and slaves and personal property therein situate in the county of Claiborne and State of Mississippi, inventoried at upwards of \$70,000, besides notes and accounts to the amount of \$161,000 and upwards, that the said plantations and slaves were, on application of Stephen Douglas, the executor, to the probate court in that State, and an order for that purpose obtained, sold, and pur-

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chased in by the widow and executrix for about the sum of \$40,000, and that the personal estate of \$161,000 and upwards, of notes and accounts, were not, and have not been, accounted for by the executor to the court of probate.

\*165] \*In short, according to the answer of the defendant, the estate and succession of the deceased debtor, inventoried at about the sum of \$300,000, and for aught that appears available to that amount, has been sold and transferred through the instrumentality and agency of family connections, under color of proceedings apparently in due form in the probate court, into the hands of the widow and a brother of the deceased, without adequate consideration, if consideration at all, and with the intent to hinder, delay, and defraud the creditors of the estate, and particularly the defendant.

The complainants excepted to the answer filed by the defendant, because the matters and doings set forth therein could not, in law, be inquired into in the present suit, or proceedings instituted by the said complainants, and prayed that they might have the benefit of their injunction, and that it might be made perpetual.

And thereupon it was agreed that the case might be set down for argument on the matters of law arising on the bill and answer; and that if the judgment of the court in matters of law should be for the defendant, the complainants might join issue on the fact, and testimony be taken in the usual manner.

The court, after argument of counsel, decreed that the exception of the complainants to the defendant's answer was well taken, and gave leave to answer over, which was declined; and, therefore, the court adjudged and decreed that the injunction theretofore awarded in the case should be made perpetual; and it was further adjudged and decreed that the complainants recover the costs of suit, without prejudice to the right of the defendant to any action he might think proper.

The decision of the court below, and the view which we have taken of the case here, do not involve the question, whether the matters set forth in the answer sufficiently established the fact that a fraud had been committed by the complainants against creditors, in the several sales and transfers of the property in question, through the instrumentality of the probate court, nor, as it respects the effect of the fraud, if established, upon the title derived under these sales. If the case depended upon the decision of these questions,

we entertain little doubt as to the judgment that should be given.

The ground of the decision below, and of the argument here, is, that the complainants were not bound to answer the allegations of fraud against their title, in the aspect in which the case was presented to the court; that a title derived under a public sale, in due form of law, by the probate judge, protected them in the full and peaceable possession and enjoyment of the property until the conveyance was vacated and set aside by a direct proceeding instituted for that purpose; and that this step, on the part of the judgment creditors, was essential, upon the established law of the State of \*Louisiana, before he could subject the property to the satisfaction of his judgment. [\*166

We have, accordingly, looked into the law of that State on this subject, and find the principle contended for well settled and uniformly applied by its courts in cases like the present. The judgment creditor is not permitted to treat a conveyance from the defendant in the judgment made by authentic act, or in pursuance of a judicial sale of the succession by a probate judge, as null and void, and to seize and sell the property which had thus passed to the vendee. The law requires that he should bring an action to set the alienation aside, and succeed in the same, before he can levy his execution. And so firmly settled and fixed is this principle in the jurisprudence of Louisiana, as a rule of property, and as administered in the courts of that State, that even if the sale and conveyance by authentic act, or in pursuance of a judicial sale, are confessedly fraudulent and void, still no title passes to a purchaser under the judgment and execution, not a creditor of the vender, so as to enable him to attack the conveyance and obtain possession of the property. In effect the sale, if permitted to take place, is null and void, and passes no title. *Henry v. Hyde*, 5 Mart. (La.) N.S., 633; *Yocum v. Bullitt*, 6 Id., 324; *Peet v. Morgan*, 6 Id., 137; *Childres v. Allen*, 3 La., 477; *Brunet v. Duvergis*, 5 Id., 124; *Samory v. Hebrard et al.*, 17 Id., 558.

The case of *Yocum v. Bullitt et al.*, among many above referred to, is like the one before us.

The court there say:—"The record shows that the slaves had been conveyed by the defendant in the execution by a sale under the private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent it must be regularly set aside by a suit instituted for that purpose; that it was not less a sale and binding upon third parties until declared null in an action

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which the law gives (*Curia Phil. Revocatoria*, n. 2); that the possession of the vendee was a legal one, until avoided in due course of law." The court further remarked, that—"The same point had been determined at the preceding term, in which it had been held that a conveyance alleged to be fraudulent could not be tested by the seizure of the property or estate belonging to the vender, but an action must be brought to annul the conveyance."

The principle runs through all the cases in the books of reports in that State, and has its foundation in the Civil Code (art. 1965, 1973, 1984), and in the Code of Practice (§ 3, art. 298, 301, 604, 607), and in *Stein v. Gibbons & Irby* (16 La., 103). And from the course of decision on the subject it is to be regarded not merely as a rule of practice, or mode of proceeding in the enforcement of civil rights, which would not be binding upon this court, but as a rule of property that \*167] affects the title and estate of the vendee, and cannot, therefore, be dispensed with without disturbing one of the securities upon which the rights of property depend. It gives strength and stability to its possession and enjoyment, by forbidding the violation of either, except upon legal proceedings properly instituted for the purpose. Neither can be disturbed, except by judgment of law. For this purpose the appropriate action is given, providing for the secession of all contracts, as well as for revoking all judgments when founded in fraud of the rights of creditors.

In this court, a bill filed in the equity code is the appropriate remedy to set aside the conveyance. In the present case a cross bill should have been filed, setting forth the matters contained in the answer of the defendant. The vendees would then have had an opportunity to answer the allegations of fraud charged in the bill, and, if denied, the parties could have gone to their proofs, and the case disposed of upon the merits.

It is said that in some of the western States an answer like the one in question would be regarded by their courts in the nature of a cross bill, upon which to found proceedings for the purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of proceeding in a court of equity.

We are of opinion, therefore, that the appellant mistook his rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill; and that instead thereof he should have filed a cross bill, and have thus instituted a direct proceeding for the purpose of setting

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aside the sales and subjecting the property to his judgments and executions; and that in this respect, and to this extent, the decree of the court below was correct.

But on looking into the decree, we are apprehensive that it has been carried further than the assertion of the principle which we are disposed to uphold, and which may seriously embarrass the appellant in the pursuit of a remedy that is yet clearly open to him.

The injunction issued, on filing the bill of complainants, commanded the appellant to desist from all further proceedings on his three judgments, or on the executions issued against the property; and the court, on the coming in of the answer, has decreed that the same be made perpetual. And further, that the complainants recover the costs of suit, without prejudice to the right of the defendant to any action he may think proper.

It is at least a matter of doubt, and might be of litigation hereafter, whether, upon the broad and absolute terms of the decree used in enjoining the proceedings, the party is not concluded from further proceedings against the property in question, founded upon these judgments and executions.

They must constitute the foundation of his right and title, upon filing a cross bill, to any relief, that he may hereafter show himself \*entitled to. The saving clause may [\*168 not be regarded as necessarily leaving a proceeding of this description open to him. A question might also be raised, whether the judgments are not so effectually enjoined, as to prevent their enforcement against property of the judgment debtor not in controversy in this suit. At all events, we think it due to the appellant, and to justice, looking at the nature and character of the transaction and proceeding as developed in the pleadings, that the case should be cleared of all doubts and dispute upon this point. We shall, therefore, reverse the decree, and remit the proceedings to the court below, with direction that all further proceedings on the three judgments and executions be stayed, as it respects the property seized and in question, but that the appellant have liberty to file a cross bill, and take such further proceedings thereon as he may be advised.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is ordered and decreed by this

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court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to that court that all further proceedings on the three judgments and executions be stayed, as it respects the property seized and in question; but that the appellant have liberty to file a cross bill, and to take such further proceedings thereon as he may be advised; and that such further proceedings be had in this cause, in conformity to the opinion of this court, as to law and justice shall appertain.

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HEZEKIAH H. GEAR, APPELLANT, v. THOMAS J. PARISH.

In this case, the pleadings and proofs show that a mortgage executed by the debtor to the creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover.

As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment.

THIS was an appeal from the judgment of the Supreme Court of the Territory of Wisconsin, sitting as a court of chancery.

Parish filed a bill in the District Court of Iowa County, Territory of Wisconsin, for the purpose of compelling Gear to enter satisfaction of a certain mortgage executed by the former to him, or to reconvey the premises therein, charging, that it had been fully paid and satisfied; and for the purpose, \*169] also, of a perpetual stay of \*a certain judgment confessed, and entered up in favor of Gear against Parish.

The mortgage was executed on the 27th of April, 1836, and was given to secure the payment of \$4,200, four months after date; and the bill charged that the whole amount, with interest thereon, had been paid on the 1st of August, thereafter, and a receipt taken for the same; that Gear had refused to deliver up and cancel the said mortgage, or reassign the premises unless the complainant would pay, in addition, the amount of a certain judgment that had been obtained against him, and which, he charged, was given for part and parcel of the money secured by the mortgage, and of course satisfied with it.

The defendant, in his answer, set up that previously to the execution of the mortgage the parties had been engaged in



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extensive business transactions with each other; that he had, at different times, advanced large sums of money to and incurred many liabilities for the complainant; and that the mortgage in question was given to secure the payment of such an amount as complainant would be found indebted in on the final adjustment of their accounts. That no settlement had taken place or balance been struck between them; but that defendant had subsequently ascertained that the sum of \$1,562.38 was justly due him, over and above the amount secured by the mortgage. That this demand was placed in the hands of an attorney for collection, whereupon the complainant confessed the judgment in question, with a stay of execution for six months.

The defendant further answered, and admitted that the mortgage had been fully paid and satisfied; but denied that he had refused to reconvey the mortgaged premises. On the contrary, he had executed and delivered to the complainant a lease of all his right and title to the premises, and which had been accepted as satisfactory.

The complainant put in a replication, and the parties went to their proofs.

There were but two witnesses examined, one of them present at the execution of the mortgage, the other at the giving of the judgment.

Hamilton, who was present at the execution of the mortgage, states that he was at Galena in the spring of 1836, when the parties were engaged in closing their business; that the amount on book due Gear exceeded \$3,000, besides other charges and accounts outstanding, the amount of which was not then ascertained. That it was agreed a mortgage of \$4,200 should be given, which, as was supposed by both parties, might be sufficient to cover the whole of the indebtedness; but that a settlement was to be made thereafter, and the exact balance ascertained, and to be adjusted accordingly, whether it should exceed or fall short of the sum specified in the mortgage. Neither party was to be concluded as to the amount; that was to depend upon the final adjustment of the accounts.

\*Mr. Turney, the attorney who gave the judgment for Parish, states that he was consulted by him at the time a suit was threatened for the recovery of this balance, claimed as due over and above the mortgage; that at the request of Parish he had an interview with the attorney of Gear on the subject, when it was agreed that, if judgment was confessed for the amount claimed, the mortgage should be given up and cancelled, and all errors corrected, if any, on

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ascertaining the balance between the parties; that the judgment was given with this understanding.

Upon this state of the pleadings and proofs, the District Court decreed that the injunction which had been previously issued, enjoining the defendant, Gear, from collecting his judgment against Parish, should be made perpetual, and that the complainant recover his costs of suit.

On an appeal to the Supreme Court of the Territory, by the defendant, the decree was affirmed, with costs. The case was brought here on an appeal from that decree.

The cause was argued by *Mr. Breese*, for the appellant, and *Mr. May* for the appellee.

*Mr. Breese* contended that the decree was erroneous, because the answer of Gear denied all the material allegations of the bill on which the injunction was allowed, and they were not sustained by the depositions of Hamilton and Turney.

*Mr. May*, for the appellee.

The principle questions presented for adjudication in this case are the following:—

I. Does the bill, answer, and proofs disclose a case in which equity can relieve?

II. What is the nature and extent of the relief to be granted in this case?

As to the first proposition, it is submitted that this is a case in which relief can alone be obtained in a court of equity. It may be viewed as an application to compel the specific performance of an agreement, which is exclusively the province of a court of equity; for at law redress may be had after a wrong is done, but equity can interpose and prevent the commission of a wrong. 1 Story's Eq. Jurisp., § 30. The relief sought in this case is the cancellation of a deed, and equity alone can afford this relief. 1 Johns. (N. Y.) Ch., 520.

But in this case a judgment at law is sought to be rendered inoperative, and all proceedings thereon stayed and restrained. It is true that a judgment at law is conclusive between the parties thereto when the merits have been passed upon, and unless reversed operates as an estoppel; but when, in the procuring of such judgment, fraud or misrepresentation, or any \*171] description of *mala fides* has been \*practised, equity will grant relief. 2 Story, Eq. Jur., §§ 885, 887; 1 Id., § 192; 1 Fonb. Eq., b. 1, ch. 1, § 3, note f (3d Am. ed., pp.

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28, 29). The only way in which a defendant can reverse or annul a judgment at law is by a writ of error; but when a judgment is obtained by confession, he is without redress at law, for confession takes away error.

But where the plaintiff's attorney, in an action at law, made an agreement with a defendant that if she would confess judgment he would levy an execution, and satisfy the judgment out of the property of another defendant, keeping her harmless; and upon such agreement a judgment was confessed, but the plaintiffs neglected and refused to comply with the agreement, a court of chancery decreed a perpetual injunction of the judgment, and, on appeal, this court affirmed the decree. *Union Bank of Georgetown v. Geary*, 5 Pet., 99. It is submitted that this case is in all respects in point and conclusive, in this cause, so far as the question of jurisdiction and power to relieve is involved. Equity will relieve against a judgment obtained at law by confession. 3 Harr. & J. (Md.), 568.

The remaining inquiry in disposing of the first question is as to the case made out by the complainant. The allegations of the bill in relation to the original transactions are, in most material respects, admitted by the defendant, and are also fully proved by the deposition of Wm. S. Hamilton, who states that the books of account of Gear were produced, showing Parish's account, and that the amount of \$4,200 was considered by all the parties as amply sufficient to cover all contingencies. The testimony of John Turney fully sustains the averments of the bill in relation to the compact and terms on which Parish confessed the judgment. But it may be argued that inasmuch as the defendant, in his answer, denies the allegations and equity of the bill in relation to this compact or agreement, it should be sustained by stronger proof in order to merit relief. It is conceded that, in equity, where any matter is averred by the complainant in his bill which is material, and the same matter is positively denied by the defendant in his answer, then the answer will prevail, unless the bill is sustained by two witnesses, or one witness and corroborating circumstances; but it is contended and insisted, that in this cause the principle is in no way applicable, and can have no bearing whatever. Equally as clear as the foregoing principle of chancery practice is another, that if a defendant, by his answer, introduces new matter, not responsive to the allegations of the bill, such new matter must be proved by other means (12 Pet., 190), or it cannot avail, and it may prejudice him by evincing a desire, on his part, to evade and lead off to matters foreign to the points in issue,

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or if a defendant's answer contains contradictory, unreasonable, or irreconcilable statements, or makes averments which are disproved by written instruments on the same point, or if it positively deny charges of which in the very nature of \*172] the thing the defendant could have no personal knowledge, then the testimony of one disinterested witness, with corroborating circumstances, will prevail, and in some instances the court will treat the answer as a nullity, disproving itself, and the bill will prevail with one witness. 9 Cranch, 160; 2 Johns. (N. Y.) Ch., 92; 5 Pet., 111; 4 Mon. (Ky.), 174; 1 Munf. (Va.), 373. In this case, Gear, in his answer, positively denies that Parish was induced to confess the judgment by the promise and undertaking of Mr. Hoge. Now it requires no argument to demonstrate that this was a matter of which Gear could have no knowledge whatever. He was not present, and even if he had been informed, still he is unwarranted in stating positively, as of his own knowledge, what were or were not Parish's motives. Moreover, he avers directly that the mortgage or deed was never acknowledged or recorded, and yet the instrument itself, which was then in his possession, directly contradicts his averment, although it may be of but little importance whether this instrument were acknowledged and recorded or not, still a defendant, who has the means of correct knowledge within his exclusive control, is bound and expected to answer truly in all things, and if he make statements in his answer, and at the same time presents that which absolutely disproves those statements, he thereby throws suspicion on his answer, and affects and taints its credibility.

If, then, the statements of the answer in regard to the agreement between Hoge and Parish are unreasonable and can have no effect, we then have the averments of the bill (which is sworn to) sustained by testimony of Turney, and the admissions of Hoge as proved by Turney. And strong corroborating circumstances are observable in the supineness of Gear in this matter. Hoge was his attorney, admitted to be such in the answer, and resided in the same place with him, and if the agreement really was not such as stated by Parish, was it not very easy for him (Gear) to obtain Hoge's deposition disproving the bill? Yet he speaks positively, as of his own knowledge, of transactions and motives of which he could know nothing, except from information, and neglects to use the proof (if any such existed) of these things, which any reasonable man would have certainly resorted to. In this relation, the case from 5 Pet., 111, is very much in point; in that case, as in this, the agreement was with the attorney,

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and the defendants in that case denied the agreement with their attorney, of which they could have no positive knowledge; in this case the defendant has pursued the same course. The agreement between Parish and Hoge, the appellant's attorney, must be considered as proved. True, it is denied by Gear in his answer, but, as has already been shown, he knew nothing about it, and his denial amounts to nothing. It was expressly and exclusively the consideration in confessing the judgment, and it was a valuable consideration to Parish, as he alleges in his bill, and appears by the testimony of [\*178 Turney. It would have enabled him to free the title of the lands he had sold, and convey them, and, it may be argued, receive a pecuniary advantage by it; for this consideration Parish relinquished all defence in the suit at law. He states that he owed Gear nothing, that he had a good defence.

In the language of this court, in 5 Pet., 114,—“It is unnecessary to examine whether this defence would have been available or not; the validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all inquiries on the subject; and the complainant, by precluding herself from setting the defence, waived what she supposed might have been of material benefit to her.”

Gear did not fulfil this agreement, made by his attorney, Hoge; he states, as the reason for his failure, that he could not find the mortgage. But it is afterwards produced, and it must be presumed to have come from his custody. The promise and inducement to the confessing the judgment was not kept by Gear, or realized by Parish. Was not this transaction, then, an imposition or fraud upon Parish? If so, all proceedings on the judgment ought to have been restrained. Did not Gear make, by his attorney, an improper and unfair use of his possession of the mortgage, which had been fully discharged by Parish, as appears by the receipt, and the terms of the mortgage itself to induce Parish to confess the judgment? 1 Sch. & L., 205.

It is plain that Gear intended to hold the mortgage until the pretended balance was paid. That, as he recollected it, “said deed was given to secure this defendant the payment of the sum of \$4,200, and such other sum as the complainant might be indebted to this defendant.”

Again, there is no proper jurat to the answer in this case,—the answer appears to have been “sworn to and subscribed” before a proper officer; but it is submitted that this cannot,

by correct chancery practice, be taken as a sufficient jurat (1 Harr. Ch. Pr., 218; 1 Turn. & V. Ch. Pr., 544); there is not that certainty as to what the deponent swears to, whether of his knowledge or of his belief (9 Cranch, 160); so that an indictment for perjury might be sustained if the deponent swore falsely. If this position be correct, then the answer in this case is, as in the case in 5 Pet., 99, merely tantamount to the general issue at law, and the material averments of the bill, so far as they are denied by the answer, are fully proved by Hamilton and Turney, and sustained by every reasonable deduction from the circumstances.

But in relation to the second question presented by this cause, which is as to the nature and extent of the relief to be extended, it is submitted that the main relief sought by the \*174] complainant is the \*cancellation of a deed. The bill, however, prays for a discovery and general relief, and the weight and current of authority is, that when equity obtains cognizance for the purpose of discovery and injunction it will retain the cause in order to do ample justice in cases such as this, where a matter of account is involved. 1 Story, Eq. Jur., § 64; 2 Johns. (N. Y.) Cas., 431; 3 Conn., 141; 10 Johns. (N. Y.), 595; 17 Id., 388; 12 Pet., 188.

It was no sufficient reason for dissolving the injunction, that Gear afterward offered to give up, release, or cancel the mortgage; the fraud or imposition had been then completed. His faith had been violated. The injury to Parish was then inflicted. His damage may have been suffered. He had been compelled, by Gear's own conduct, to bring him into a court of equity. Being there, Gear was in no wise injured, he had the fullest and fairest right and opportunity to claim his demand, and if just have it allowed.

The relief given in this case should therefore go farther than the cancellation and pass upon and decide the unsettled account between the parties. If there was, as Gear understood and recollected, an unsatisfied balance charged on the mortgage, that very question was presented for the consideration of the court; as the bill prays to have "the mortgage indenture cancelled, on paying the balance of the mortgage money, if any," &c. The account between the parties was then fairly presented to the court.

The appellant had ample time and opportunity to sustain his account, if any he had, to show that the balance claimed was omitted by mistake or otherwise in the settlement of their accounts in 1836, when the mortgage was given to secure the full sum claimed, and more; but Gear did not offer any evidence to prove the balance of his account.

Besides, the account on which the judgment was confessed was very properly, under the circumstances, to be reviewed; it was, according to the testimony of Turney, a judgment upon terms, that is, "any errors in the account sued on would be corrected by Gear."

The defendant made the indebtedness of Parish, upon which the judgment was obtained, a substantive allegation in his answer; the *onus probandi* was with him to prove these allegations, and undoubtedly if he had proved his claim the chancellor would have decreed payment in accordance with equity and justice. But when he neglected to do so, having ample time and opportunity, and being presumed to know his legal rights, and allowed the cause to be heard by the court without the shadow of any such proof, the fair and just inference is that he could not prove any further indebtedness against Parish, especially when Hamilton's testimony shows that the books of account of Gear were produced on the original settlement, and they then presented no such indebtedness; but, on the contrary, all parties appeared satisfied that \$4,200 would cover the whole claim.

\*Mr. Justice NELSON delivered the opinion of the court. [\*175

We are unable to discover any foundation for the decree of the court below. The pleadings and proofs narrowed the question down to the simple inquiry as to the force and effect of the judgment between the parties, which had been rendered upon confession. The answer appears to have removed all further complaint about the refusal of Gear to cancel the mortgage and disencumber the premises, as the subject is not carried into, nor made a part of, the decree. That is confined to the order enjoining the defendant, his agents and attorneys, perpetually from collecting the judgment.

The sole question, therefore, is, whether or not, upon the pleadings and proofs, the appellant is justly entitled to enforce the payment of this money.

The bill of complaint admits, and the answer reiterates the admission, that the mortgage was executed to secure the payment of an unadjusted balance of accounts arising out of extended business transactions. The exact sum being, at the time, unascertained, an amount was agreed upon, and carried into the mortgage, supposed to be large enough to cover any balance that might be found due.

Neither party was to be concluded by the mortgage, or the amount agreed upon. The actual indebtedness was to depend upon a future settlement of the accounts.

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The proofs confirm this view, and further establish, that the judgment was confessed voluntarily and advisedly, for a balance ascertained, and claimed by Gear to be due over and above the mortgage; and that the only reservation made, at the time, was the privilege of correcting errors in the adjustment of the accounts, if any should be made to appear thereafter.

The judgment was not given, as in the case of the mortgage, for an unascertained balance; and therefore a security, simply, for whatever sum the plaintiff might thereafter show to remain due and unpaid. A specific sum was claimed, as the true balance of the accounts, and a suit threatened. The judgment was confessed for this sum, subject to the right of Parish to reduce the amount. Failing or omitting to do this, the whole amount was collectable. The burden lay upon him to show the errors, if any; that he assumed, according to the very terms upon which he consented to confess the judgment; and as no errors were shown, or are even pretended, in the case before us, it is clear the plaintiff is entitled to the whole amount of his judgment and to execution for the same; and that the court below erred in entertaining the bill and awarding the injunction.

We shall, therefore, reverse the decree of the court below, with costs, and remit the proceedings, with direction to dissolve the injunction, and dismiss the bill with costs of suit.

## ORDER.

This cause came on to be heard on the transcript of the record \*from the Supreme Court for the Territory of Wisconsin, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Supreme Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Supreme Court, with directions to that court to dissolve the injunction in this case, and to dismiss the bill of the complainant with costs of suit.

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IN THE MATTER OF NICHOLAS LUCIEN METZGER.

The treaty with France, made in 1843, provides for the mutual surrender of fugitives from justice, in certain cases.

Where a district judge, at his chambers, decided that there was sufficient cause for the surrender of a person claimed by the French government,



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and committed him to custody to await the order of the President of the United States, this court has no jurisdiction to issue a *habeas corpus* for the purpose of reviewing that decision.<sup>1</sup>

*Mr. Coxe* moved for a *habeas corpus*, according to the following petition, which he read, and also the decision of the judge below.

“To the Honorable, the Justices of the Supreme Court of the United States:—

“The petition of Nicholas Lucien Metzger respectfully sheweth.—That he is restrained from his liberty, and is now a prisoner in jail, and under the custody of the marshal of the Southern District for the State of New York, and that he has been committed to such jail and custody, and is now confined and detained therein, under and by virtue of a warrant and order of the Hon. Samuel R. Betts, district judge for the Southern District of New York, as an alleged fugitive from justice, pursuant to the provisions of the convention signed between the United States and the French government, on the 9th of November, 1843.

“That annexed hereto is a copy of the order, under and by virtue of which your petitioner has been apprehended and committed, and is now detained in custody.

“Wherefore, your petitioner prays, that a writ of *habeas corpus* may issue from this honorable court, to be directed to the marshal of the Southern District of the State of New York, or to such other persons as may hold or detain your petitioner under and by virtue of said order, commanding him or them to have the body of your petitioner before this honorable court, at such time as in said writ may be specified, for the purpose of inquiring into the cause of commitment of

<sup>1</sup> APPLIED. *Ex parte Vallandigham*, 1 Wall., 253. RELIED ON. *In re Kaine*, 14 How., 119, 180. QUESTIONED. *Ib.*, pp. 183, 147; *Ex parte Yerger*, 8 Wall., 99; *Ex parte Virginia*, 10 Otto, 341. CITED. *Ex parte Lange*, 18 Wall., 166; *Hyatt v. Allen*, 54 Cal., 364. See also *People v. Martin*, 2 Edm. (N. Y.) Sel. Cas., 34.

This was an application to the Supreme Court to issue the writ of *habeas corpus*, and that court refused it because it had no original jurisdiction, nor appellate jurisdiction from the district judge sitting, as such, and not as a court. *Ex parte Kaine*, 14 How., 103, was a like decision. But

the Circuit and District courts, and the judges thereof, have full power to issue the writ. *In re Kaine*, 3 Blatchf., 1; *In re Heinrich*, 5 Id., 414; *In re Farez*, 7 Id., 34; s. c., 11 Id., 345; *Ex parte Van Aernam*, 3 Id., 160; *In re Macdonnell*, 11 Id., 79; s. c., Id., 170; *Ex parte Van Hoven*, 4 Dill., 414; *In re Vermaitre*, 9 N. Y. Leg. Obs., 129; *In re Heilbrow*, 12 Id., 65.

In one case a State court issued a writ of *habeas corpus*. *In re Heilbrow*, 1 Park Cr., 429; but the contrary is now decided. *United States v. Booth*, 21 How., 566; *People v. Curtis*, 50 N. Y., 321; *Passmore Williamson's Case*, 26 Pa. St., 9.

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your petitioner, and to do and abide such order as this honorable court may make in the premises.

“And your petitioner will ever pray, &c.

METZGER.

\*177] “Sworn to before me, this 20th day of January, 1847.

GEORGE W. MORTON,  
*United States Commissioner for the Southern  
District of New York.*”

“In the Matter of Nicholas Lucien Metzger:—

“This case having been heard before me, on requisition through the diplomatic agents of the French government that the said Metzger be apprehended and committed for the purpose of being delivered up as a fugitive from justice, pursuant to the provisions of the convention signed between the United States and the French government on the 9th of November, 1843:

“And exceptions having been taken by the counsel of the said Metzger, in his behalf, to the competency of a judge of the United States to take cognizance of the subject-matter, and to the sufficiency of the evidence to justify any judicial action under the treaty:

“And these exceptional objections being fully argued before me by Messrs. Blunt and Hoffman, of counsel for Metzger, and by Messrs. Tilton and Cutting in support of the requisition, and by Mr. Butler, United States Attorney, on the part of the United States (in respect to the jurisdiction of the judge, and the period the treaty went into operation):

“I find and adjudge, that a judge of the United States has competent authority, under the laws of the United States now in force, to take cognizance of this case, and to order the apprehension and commitment of the accused, pursuant to the provisions of the said treaty.

“I further adjudge, that the said treaty took effect and went into operation on and from the day of the signature thereof.

“I further adjudge, that the laws of France are to determine the constituents of the crime of forgery, or ‘*du faux*,’ of which Metzger is accused, and that the facts in evidence adequately prove the commission of that crime by him in France, since the date of the treaty.

“I further find and adjudge, that Metzger is, within the meaning and description of the treaty, a *person accused*, ‘*individu accusé*,’ of the crime of forgery, or ‘*du faux*,’ named

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in the treaty, and therefore subject to apprehension and commitment under our laws, pursuant to the provisions of the treaty.

"And I find and adjudge, that the evidence produced against the said Metzger is sufficient in law to justify his apprehension and commitment on the charge of forgery, had the crime been committed within the United States.

"Wherefore I order, that the said Nicholas Lucien Metzger be apprehended and committed, pursuant to the provisions of the said treaty, to abide the order of the President of the United States in the premises.

"Given under my hand and seal at the city of New York, this nineteenth day of January, one [\*178 [L. s.] thousand eight hundred and forty-seven.

(Signed,)

SAMUEL R. BETTS,

*Judge of the United States for the Southern District of New York."*

The case was argued by *Mr. Coxe*, on behalf of the petitioner, and by the Attorney-General (*Mr. Clifford*) and *Mr. Jones*, in opposition to the motion.

*Mr. Coxe*, for the motion.

In conveying the intimation that the court would hear an argument on behalf of the petitioner, no suggestion was thrown out as to the points to which counsel were desired to address themselves under these circumstances. What fell from the bench conveyed merely the idea that doubts were entertained by the court, but it conveyed no intelligence as to the character of these doubts, to what part of the case they extended, or whether they embraced the substantial merits of the petitioner's case, or were limited to the form and language in which the application was presented.

Had the posture of the case permitted the court to adopt a practice which has on many occasions heretofore prevailed when similar applications have been made, and grant a rule upon the United States, or those who represent the French government, to show cause why the prayer of the petitioner should not be granted, it would have relieved his counsel from much embarrassment. The grounds upon which the application was to be resisted would have been distinctly announced, and full opportunity would have been afforded to meet, and, if practicable, to answer them. In the situation, however, in which the case then stood, ignorant whether either government felt any such interest in the proceeding as would induce it to intervene by a direct opposition to the

motion which was submitted, it would scarcely have been proper for me to have suggested, or for the court to have sanctioned, the adoption of such a course.

At the same time, the appearance of counsel to resist the application only augments the difficulties of the position I occupy. Whatever may have been the origin of the doubts entertained on the bench, it by no means follows that the learning and abilities of counsel may not multiply and increase the number, as well as weight, of these objections. Placed, therefore, in this predicament by the very nature of the case, it imposes upon me the necessity of pursuing a course between two opposing difficulties,—of neither undertaking to anticipate, and attempting to answer by anticipation, the views and arguments of my learned friends, or of failing to exhibit a *prima facie* case at least calling for the interposition of this court.

\*179] \*Reserving, therefore, the privilege of answering the objections which may be urged against my application, I proceed briefly to state the grounds upon which reliance is placed to sustain it.

The petition, then, alleges, that the party on whose behalf and in whose name it is presented is now in actual confinement in jail, in the custody of the marshal of the Southern District of New York, by whom he is thus held and restrained by virtue of an order or warrant of commitment, issued and signed by the Hon. Samuel R. Betts, district judge of the Southern District of New York. It appears that this warrant of commitment is a process utterly unknown to the common law or statute law of the United States. It is not for the purpose of bringing the accused to trial before any court of the Union, for any offence committed against the laws of the United States, or triable before any of its courts; it is not for the purpose of enforcing any responsibility in the shape of a debt due to any creditor, for the violation or breach of any contract, or to answer to any allegation of a tort of which those courts have cognizance; nor is it in the nature of an execution to compel the prisoner to respond to any process in the nature of an execution upon any judgment rendered against him by any court of the United States, or in the nature of an attachment for any contempt committed against such tribunal.

All this is fully set forth in the petition, and in the order of commitment annexed to it. The object, therefore, of the writ now sued for is, to enable this court to pronounce its judgment upon the lawfulness of such an imprisonment, and upon the authority under which it has been made.

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The simple fact that such imprisonment exists under color and pretence of right presents a *prima facie* case warranting the application now made, and the language of the constitution and statutes of the United States, taken in connection with the reiterated judgments of this court asserting its power, and actually exercising the jurisdiction and authority now invoked, would seem clearly to establish *prima facie* a right in the petitioner to have the benefit of this high prerogative writ. If there is any ground of objection, growing out of the circumstances of the case, which destroys this *prima facie* presumption as to the facts, they are to be found in the peculiar characteristics of those circumstances which attend the arrest of the petitioner; if any to meet the legal authorities upon which we rely, they must in consequence of these circumstances be held inapplicable to the case under consideration.

The points which are thus presented for the adjudication of this court are,—

1. Whether the facts as presented exhibit a proper case for the awarding of a writ of *habeas corpus*.

2. Whether, if such be the case, this court has authority and jurisdiction over it.

\*1. As to the facts. It is understood that an application was made to the executive, by the minister representing the French government, for the apprehension and delivery of the petitioner. This application was declined, on the ground that no such power resided in that branch of the government, and the French government was referred to the judicial department. In declining itself to act without farther legislative authority, I conceive the executive rightly judged. In the opinion that the judiciary possessed the power, I think it erred. This, however, was clearly an *obiter* expression of opinion, and not decisive on this question. The former part of the opinion is opposed by very eminent authority.

Be this as it may, the executive refused to comply with the requisition, and there has been no warrant of arrest or order of commitment emanating from that quarter.

An arrest was then made by a local magistrate of New York, who decided that he had authority over the case. The petitioner was then liberated by a circuit judge of that State, who decided that the State judiciary had no jurisdiction, and on this ground discharged the party on *habeas corpus*.

The diplomatic representative of the French government then addressed Judge Betts, the district judge of the United States, who, after full hearing, decided that the federal judi-

ciary had jurisdiction over the party and the case, and awarded the order of commitment.

The entire judgment of the district judge rests upon the ground that he is exercising judicial power, and determining a question of judicial jurisdiction.

If he be right on this point, this court will probably refuse the *habeas corpus*, because, concurring in the opinion, they would feel themselves compelled to remand the prisoner, his imprisonment being for lawful cause and by competent authority. If wrong, the writ ought to issue, because the arrest was unlawful.

I am aware that this court has held, that, in awarding this writ, it does so in the exercise of appellate and not original jurisdiction, and that a doubt has been expressed whether, this being a proceeding before the district judge at chambers, this court can exercise any revisory power over it. This question will be presented more fully hereafter. In the mean time I would suggest, that to act upon this distinction would seem to involve this extraordinary conclusion, that if the district judge, acting in open court upon a case regularly before him, should commit a party to prison, this court would possess the jurisdiction to award the writ; but inasmuch as the commitment was in the exercise of an undoubted power, the judgment of the District Court, not being revisable here, would be final, and the court, seeing that it must necessarily remand upon the hearing, would decline to issue the writ; whereas, if it appeared that the judge exercised an authority not \*181] granted by law, \*and assumed a jurisdiction not belonging to him, then, as he did not act in open court, his proceedings, however erroneous and unauthorized, cannot be drawn in question here through the instrumentality of this writ.

Such has not been the interpretation heretofore given by this court to its own grant of power. With this general remark this point will be postponed for the present, until we reach it in the regular progress of the argument.

Let us now examine whether the district judge, either as presiding in the District Court or at chambers, had any authority to hear this application, to exercise any jurisdiction over the case, and to make the order for commitment. I apprehend this question must be answered in the negative.

The courts of the United States, and the judges of those courts, can exercise no powers of a judicial character, and can possess no jurisdiction, except that which is conferred upon them under the authority of the constitution by act of Congress.

The Supreme Court is the only court named in the constitution, and even this high tribunal has no existence simply by the force and operation of the constitution itself. Until Congress brought it into existence, and gave it organization, it existed rather *in posse* than *in esse*. But the inferior courts, the Circuit and District Courts, exist only under the authority of legislation. Congress alone created them, meted out to each the powers which it enjoys, prescribed the orbit within which it should move, and prescribed every limit by which its jurisdiction was to be ascertained. I am entitled to put the question which I now address to this court, and to my learned friends, Where is to be found any grant of jurisdiction to a District Court, far more to a district judge, to exercise the power assumed in the present case? Upon what act of Congress can the finger be laid which confers it? None such exists.

The only ground upon which this claim was rested before and by the district judge is that of the treaty stipulations with France, and the means by which he acquired jurisdiction on application addressed to him by the diplomatic agent of the French government. With great deference, I cannot but think the mode as irregular as the authority unfounded.

Under our institutions there exists but one legitimate channel of communication between this and any foreign nation; that organ is the executive. It is unprecedented in our judicial and legislative annals, for the diplomatic representative of a foreign government to address himself immediately to the judicial or legislative departments. Such a course is equally unknown to the history of England.

Nor in my judgment is it less extraordinary in an American judge to regard such an application to him as in the nature of the original writ out of chancery, to call into action the latent powers of the judiciary. A record which should begin by setting forth such a paper \*would be a judicial if not a political curiosity, and it is hoped it may be brought [\*182 before the eyes of this court by a writ of *certiorari* to accompany the *habeas corpus*.

But no such jurisdiction exists to be evoked and called into exercise by this or any other process. It has been observed, that no such authority is conferred by any statute. With submission I may say, that to me it seems preposterous to assert that it may be conferred by treaty. It is a new idea to me that the treaty-making power can, by the most latitudinarian construction, be held to be a constitutional source of power and jurisdiction to any court or judge of the United States. New objects of judicial power, new subjects upon

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which it is to operate, may extend the number of cases which may be presented for judicial decision, but can never be appealed to as a grant of judicial power. Treaty stipulations operate only directly upon the parties to them, and not upon the citizens, except as part of the law of their own land. All may recollect the recent circumstance arising between England and Brazil, in which it was thought necessary to invest, by legislative authority, the British courts with jurisdiction to enforce the provisions of the treaty upon Brazilian subjects.

In 1794, Jay's treaty, 27th article, provided for the surrender of fugitives from justice; 8 Stat. at L., 129. In 1842, the Ashburton treaty, art. 10, Id., 576. In 1843, the convention with France, Id., 580. In the absence of legislative provisions, can either of these treaties be executed?

A recent occurrence in our history may illustrate this: Act of Aug. 8, 1846, ch. 105; Acts, &c., p. 78.

If, then, the district judge has assumed a power not conferred upon him, can this court award a *habeas corpus*? If adherence is had to judicial precedents, not hastily or inconsiderately decided, there is an end to this question. *United States v. Hamilton*, 3 Dall., 17, precisely in point, in 1795; in 1806, *Ex parte Burford*, 3 Cranch, 448; in 1807, *Bollman & Swartwout*, 4 Id., 75; *Ex parte Cabrera*, 1 Wash. C. C., 232; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 200; 7 Id., 568.

*Mr. Clifford*, the Attorney-General, submitted three propositions:—

1. That the treaty took effect and went into operation on and from the day of the date thereof.

2. That the judge of the District Court had competent authority, under the provisions of the treaty and the laws of the United States now in force, to take jurisdiction of this case, and to order the apprehension of the accused in the manner in which it was done, pursuant to the stipulations of the treaty.

As the decision of the court was exclusively on the point of jurisdiction, it is not considered necessary to do more than \*183] give the \*authorities cited by the Attorney-General to sustain these two propositions. On the first he cited, 1 Kent, Com., 169, 170; *Hylton v. Brown*, 1 Wash., 312; Wheat. International Law, 306, 573; *United States v. Arredondo*, 6 Pet., 748, 758; 2 Burlamaqui, 233; Vattel, B. 3, § 239; Rutherford's Inst., B. 2, chap. 9, § 22; Martens, B. 2, chap. 1, § 3; 2 McC.'s Dict. Com., 654-674. On the second he cited, *Foster v. Neilson*, 2 Pet., 314; *United States v. Arre-*



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*dondo*, 6 Id., 734, 735; Constitution, art. VI.; *Case of Thomas Sheagle*, Massachusetts District, October Term, 1845, MS.; 8 Stat. at L., 129; Jay's Treaty, art. 27; *United States v. Nash alias Robbins*, Bee, 266; 3 Story, Com., §§ 1640, 1641; *Osborn v. Bank of the United States*, 9 Wheat., 738; Constitution, art. III., § 2; *Chisholm v. State of Georgia*, 2 Dall., 419; *Rhode Island v. Massachusetts*, 12 Pet., 657; *Barry v. Mercein*, ante, p. 103; *United States v. Bevans*, 3 Wheat., 336; *United States v. Wiltberger*, 5 Wheat., 76; Judiciary Act of 1789, §§ 9, 11, 33; *Picquet v. Swan*, 5 Mason, 42; *United States v. Schooner Peggy*, 1 Cranch, 109, 110; 3 Story, Com., § 1515; *Case of Santos*, 2 Brock., 494.

3. The third proposition submitted was, that the Supreme Court has no authority, under the constitution and laws of United States, to grant the writ of *habeas corpus* prayed for in the petition. 1st. Because its original jurisdiction is restricted to cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. 2d. Because it possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, where conferred, be exercised in any other form or by any other mode of proceeding than that which the law prescribes. 3d. Because the Supreme Court was created by the constitution, and its jurisdiction was conferred and defined by that instrument and the laws of Congress made in pursuance thereof; consequently, it possesses no inherent common law powers beyond the written law.

1st. No original jurisdiction in this case. By art. III., § 2, of the constitution, it is provided, that the judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The second section describes the whole circle of the judicial power of the United States, giving its extent and boundaries; it then distributes that power, first in marking and defining the original jurisdiction of the Supreme Court, limiting it, with a precision and certainty defying all construction, to cases affecting ambassadors, other public ministers and consuls, and cases to which a State shall be a party. So firmly is this view of the case established by the constitution, that Congress itself has no power to enlarge the original jurisdiction of this court, or to extend it to any other cases than those enumerated. \*It was accordingly held, that so much of the thirteenth section of the Judiciary Act [\*184 as gave authority to the Supreme Court to issue writs of *mandamus* to public officers was unconstitutional and void. *Marbury v. Madison*, 1 Cranch, 173-175; *Cohens v. Virginia*,

6 Wheat., 400. The original jurisdiction of the Supreme Court can neither be enlarged or restrained, but must stand as it is written in the constitution by which it is conferred.

2d. No *appellate* jurisdiction. The appellate power of the Supreme Court is described in the constitution in these words:—"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The appellate authority, though somewhat extensive under the constitution, is not general, but is limited and confined to the cases specially enumerated, and is made subject to such exceptions and regulations as Congress may from time to time prescribe. The grants conferring original and appellate jurisdiction disclose this marked distinction;—the former can neither be restrained or enlarged; the latter, while it cannot be enlarged beyond the limits of its circle, yet within those limits Congress may confer as much or as little as in its discretion it may consider wise and expedient. *Barry v. Mercein*, ante, p. 103.

The authority to issue writs of *habeas corpus* is not claimed to be among the enumerated cases of original jurisdiction conferred upon the Supreme Court. The language of the grant in this respect leaves nothing for implication; if any doubt could arise, the case of *Marbury v. Madison* silences argument and dispute upon the point. *Ex parte Barry*, 2 How., 65. The appellate jurisdiction, being given with such exceptions and under such regulations as Congress may make, can only be exercised in pursuance of an act of Congress conferring the authority and prescribing the mode in which it shall be performed; that is, the manner of exercising the power must first be regulated by law. The question, therefore, in any given case, whether the court has appellate jurisdiction over it, resolves itself into the simple inquiry, whether such case falls within the legislative provisions enacted in pursuance of the constitution relative to the exercise of this branch of jurisdiction. *Wiscart v. Dauchy*, 3 Dall., 327; *United States v. Moore*, 3 Cranch, 172; *Duroseau v. United States*, 6 Cranch, 313. In search of the vagrant power to issue this writ, all other resorts failing, it must be found, if it exist anywhere, in the appellate jurisdiction of this court. That is clearly admitted in the *Case of Bollman & Swartwout*, 4 Cranch, 100, mainly relied on by the petitioner. In all cases where this power has been claimed or exercised, it has been invariably justified on the ground that it was an element of appellate authority. Thus, in *Ex parte Watkins*, 3 Pet., 202, Chief Justice Marshall says,—“It is in

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the nature of a writ of error to examine the legality of the "commitment." Same case, 7 Pet., 572. In *Ex parte Milburn*, 9 Pet., 704, in note, Chief Justice Marshall again [\*185 says,—“As the jurisdiction of the Supreme Court is appellate, it must be first shown that the court has the power in this case to award a *habeas corpus*.” In the final opinion in the case, the writ was refused upon other grounds. Subsequently, in *Ex parte Barry*, 2 How., 65, Mr. Justice Story maintains the same view, and discloses what may be considered the true doctrine upon the whole subject of the power of this court to grant writs of *habeas corpus* under existing laws. He says:—“No case is presented for the exercise of the appellate jurisdiction of this court, by any review of the final decision and award of the Circuit Court upon any such proceedings. The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now the constitution of the United States has not confided any original jurisdiction to this court, except in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. The present case falls not within either predicament. It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition, and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution or laws of the United States.” The appellate power must be sought and found, if it exist, in the acts of Congress conferring it upon this court. Certainly no question can arise upon the twenty-fifth section of the Judiciary Act, which stands in many respects upon different principles. The thirteenth section of that act provides, that “the Supreme Court shall also have appellate jurisdiction from the Circuit Courts, and courts of the several States, in the cases hereinafter specially provided for.” The twenty-second section limits the appellate power upon a writ of error of a Circuit Court to final decrees and judgments in civil action in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs. And upon a like process, this court may reëxamine and reverse or affirm final judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from the courts of the several States, or by appeal there from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars exclusive

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of costs. The proceeding in this case cannot be sustained under this section. There is no writ of error, which is the only process mentioned by which it could be instituted; there is no final judgment or decree in any inferior court, within the meaning of the law; it is not a civil action, much less a suit in equity, and therefore not within the scope and meaning of the section.

\*186] \*The Supreme Court has no appellate jurisdiction in criminal cases, according to repeated decisions which have never been questioned. *United States v. More*, 3 Cranch, 172; *United States v. La Vengeance*, 3 Dall., 297; *United States v. Hudson et al.*, 7 Cranch, 32.

Jurisdiction is defined to be the power to hear and determine a cause. Appellate jurisdiction is the power to correct and revise the judgment of an inferior court. Chief Justice Marshall says, in *Marbury v. Madison*, 1 Cranch, 175,—“It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create the cause.” The case, or subject-matter in dispute, now under consideration was not instituted in any tribunal over which this court may exercise any supervisory power; it was not a proceeding in court, but before the district judge, sitting and acting in his capacity as a magistrate, under the thirty-third section of the act of 1789. The power of this court, under the constitution and laws of Congress, does not and cannot reach the forum where the matter was instituted and decided. This court has no revising power over the District Court, nor is it authorized to issue a writ of prohibition to it in any case, except where that court is proceeding as a court of admiralty and maritime jurisdiction. *Ex parte Christie*, 3 How., 352. And this is true, although writs of prohibition are enumerated in the fourteenth section of the act. The application in that case was, that the writ might issue to an inferior court, performing the functions of a court, and having exclusive jurisdiction of the subject-matters in controversy. If there is no power to revise the doings of a bankrupt court under federal authority, where is the right to assume control over the doings of a justice of the peace, or a district judge, while sitting as a committing magistrate? *McCluny v. Silliman*, 2 Wheat., 369; *McIntire v. Wood*, 7 Cranch, 504. The revising power of this court does not extend to the person, but, when it exists, it operates upon the inferior tribunal and the subject-matter in controversy. The district judge, in the capacity in which he acted, under the laws of the United States, was entirely independent of this court; his decision was final and conclusive; and this court

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could not reverse or affirm it were the record brought up directly by writ of error, and so is the decision in *Ex parte Watkins*, 3 Pet., 201. It has already appeared that the Supreme Court has no appellate jurisdiction of crimes and offences, and of course no process issuing here can extend to the subject-matter of this application. This is therefore, undeniably, a call upon the court to exercise original power in granting the writ in question. That power this court has directly and solemnly, on several occasions, decided it does not possess. In all the cases where the power has been exercised or countenanced, it has been upon the ground of revising, in some form, the doings of an inferior \*tribunal, [\*187 over which this court possesses appellate power. Here the Attorney-General cited and commented on the following cases on this point, in addition to those already mentioned: *United States v. Hamilton*, 3 Dall., 17; *Ex parte Burford*, 3 Cranch, 453; *Ex parte Dorr*, 3 How., 104.

3d. The Supreme Court possesses no inherent or common law power to grant writs of *habeas corpus*. On this point it was insisted, that a review of all the cases would show that the doctrine had been uniformly repudiated by the court, and that since the decision of *Bollman & Swartwout* it has been abandoned by the bar. Some comments were made on the second clause of section ninth of the first article of the constitution, which provides that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. This provision was regarded as one containing a prohibition upon the powers of Congress, and not as one conferring any authority on the federal courts. 3 Story, Com., § 1332.

In conclusion, it was insisted, that all the power of this court to issue writs of *habeas corpus* was derived from the fourteenth section of the Judiciary Act. There are two clauses in the section upon this subject, which should be treated separately. The seeming inconsistency, if any exists, in the cases decided, has doubtless arisen by omitting to keep clearly in view the manifest distinction in the nature and character of the power conferred by these two clauses. The first provides, that "all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law." This clause undoubtedly authorizes the issuing of inferior writs of *habeas corpus* in aid of jurisdiction, which have been long known in the practice of courts, and

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are indispensable in the course of legal proceedings. *Bac. Abr., Habeas Corpus*, A.; 2 Chit. Bl. Com., 130. The second clause is in these words:—"And that either of the justices of the Supreme Court, as well as the justices of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment." Undoubtedly this clause authorizes the issue of the great writ of *habeas corpus ad subjiciendum*, which is of general use to examine the legality of commitments in criminal cases. The power conferred by this clause is expressly delegated to *either* of the justices of the Supreme Court, and not to the whole, when convened for the trial of causes. If the question were one of new impression, it would seem to follow, that the authority to be derived from the law should be exercised according to the language of the act. In the present case, however, it is not necessary to insist on the point, as the proceeding below was not in a tribunal over which this court has any appellate power.

\*188] \*Mr. Justice McLEAN delivered the opinion of the court.

This is a petition for a *habeas corpus*, in which the petitioner represents that he is a prisoner in jail, under the custody of the marshal for the Southern District of the State of New York, by virtue of a warrant issued by the judge of the United States for said district, as an alleged fugitive from justice, pursuant to the provisions of the convention signed between the United States and the French government on the 9th of November, 1843.

On a full hearing at chambers, the district judge held "that the evidence produced against the said Metzger was sufficient in law to justify his apprehension and commitment on the charge of forgery, had the crime been committed within the United States"; and the prisoner was "committed, pursuant to the provisions of the said treaty, to abide the order of the President of the United States."

In the first article of the convention for the surrender of criminals between the United States and his Majesty, the king of the French, on the 9th of November, 1843, it was "agreed, that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: provided, that this shall be done only when the fact of

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the commission of the crime shall be so established, as that the laws of the country in which the fugitive or the persons so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed."

The second article specifies, among other crimes, that of forgery, with which the prisoner was charged.

The third article declares that, "on the part of the government of the United States, the surrender shall be made only by the authority of the executive thereof."

It is contended that the treaty, without the aid of legislation, does not authorize an arrest of a fugitive from France, however clearly the crime may be proved against him;—that the treaty provides for a surrender by the executive only, and not through the instrumentality of the judicial power.

The mode adopted by the executive in the present case seems to be the proper one. Under the provisions of the constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, it may become a subject of judicial cognizance. The surrender of fugitives from justice is a matter of conventional arrangement between states, as no such obligation is imposed by the laws of nations.<sup>1</sup>

Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, \*very properly as we suppose, referred it to the judgment of a judicial officer. The [\*189 arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty.

The jurisdiction of this court in this matter is the main question for consideration. As this has been argued fully,

<sup>1</sup> Mr. Phillimore, after examining the question of extradition, says: "It may be further remarked that the obligation to deliver up native subjects would now be denied by all States, even by those which carry the general doctrine of extradition as to criminals to the farthest limit; and that it is generally admitted that extradition should not be granted in the case of political offenders, but only in the case of individuals who have committed crimes against the Laws of Nature, the laws which all nations

regard as the foundation of public and private security." 1 Phillimore International Law, 413 (1854); Lawrence's Wheaton, 232 (1803).

The authorities and cases in favor of the extradition are referred to by Mr. Chancellor Kent in *In re Washburn*, 4 Johns. (N. Y.), 166; 1 Kent Com., 36, 37. Against this proposition are the cases of *Respublica v. Deacon*, 10 Serg. & R. (Pa.), 125; *Respublica v. Green*, 17 Mass., 515, 548; *Holmes v. Jennison*, 14 Pet., p. 540.

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and as it is supposed that there is a conflict in the decisions of this court on the subject, a reference will be made to the cases which have been adjudged.

In the *United States v. Hamilton*, 3 Dall., 17, a writ of *habeas corpus* was issued, on which the defendant, who was charged with high treason, was brought into court. He had been committed on the warrant of the district judge. A motion was made for his discharge, "absolutely, or at least upon reasonable bail." The court held the prisoner to bail. From the opinion pronounced, it appears the deliberation of the court was chiefly on the subject of appointing a special circuit court to try certain offences, which, for the reasons assigned, they refused to do.

Here, it is said, was an original exercise of jurisdiction by the court, as it does not appear that the district judge was holding a court at the time of the commitment. No objection seems to have been made to the jurisdiction, and the court did not consider it. The defendant was discharged on bail, and this may be presumed to have been one of the main objects of the writ.

The thirty-third section of the Judiciary Act of 1789 provides, that, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a justice of the Supreme Court," &c. Hamilton's case was within this section, the charge against him being treason, which was punishable with death. The case is not fully reported. The motion to discharge the prisoner is not noticed in the opinion of the court, and this omission may be accounted for on the ground that they had no power to discharge. But, whether this presumption be well founded or not, it is clear, if this were not the exercise of an original jurisdiction, that the court had a right to admit to bail, under the section, and for that purpose to cause the defendant to be brought before them by a *habeas corpus*.

*Ex parte Burford*, 3 Cranch, 448, was a *habeas corpus*, on which the prisoner, who had been committed by the Circuit Court of this District, was discharged, there being no sufficient cause for the commitment.<sup>1</sup>

*Ex parte Bollman & Swartwout*, 4 Cranch, 75, gave rise to much discussion on the power of the court to issue a writ of *habeas corpus*; and, in their opinion, they consider the subject with great care.

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<sup>1</sup> See *In re Kaine*, 14 How., 126.



\*The chief justice disclaimed all jurisdiction in the case, "not given by the constitution or laws of the [\*190 United States."

He refers to the fourteenth section of the Judiciary Act above cited, in these words:—"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. Provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Bollman and Swartwout had "been committed by the Circuit Court of the District of Columbia, on a charge of treason against the United States."

The court held, that the proviso limiting the cases in which the writ should issue extends to the whole section, and that they could issue the writ, as it was clearly the exercise of an appellate jurisdiction; that "the revision of a decision of an inferior court, by which a citizen has been committed to jail," is an appellate power.

In *Ex parte Kearney*, "who was committed by the Circuit Court of the District of Columbia, for an alleged contempt," 7 Wheat., 38, the court said, that the case of Bollman and Swartwout expressly decided, upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest." And they held, "that a writ of *habeas corpus* was not a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction."

The preceding cases were all referred to in *Ex parte Watkins*, 3 Pet., 193, and the court said,—“Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded.”

Again, in 7 Pet., 568, the case of *Ex parte Watkins* was brought before the court on a writ of *habeas corpus*, on the ground that the prisoner "would not be detained in jail lon-

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ger than the return day of the process, and he had been brought into court and committed, by the order of the court, to the custody of the marshal." This committal was required by the law of Maryland, in force in this District, and it not having been ordered, the court discharged the petitioner.

In all the above cases, except in that of Hamilton, this \*191] court \*sustained the power to issue the writ of *habeas corpus*, in the exercise of an appellate jurisdiction under the fourteenth section of the act of 1789; and the case of Hamilton was probably sustained under the thirty-third section of the same act, for the purpose of taking bail. The same doctrine was maintained in *Ex parte Dorr*, 3 How., 104. In that case the proviso in the fourteenth section was considered as restricting the jurisdiction to cases where a prisoner is "in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify."

The case under consideration was heard and decided by the district judge at his chambers, and not in court; and the question arises, whether the court can exercise jurisdiction to examine into the cause of commitment, under such a state of facts.

There is no pretence that this can be done, in the nature of an appellate power. This court can exercise no power, in an appellate form, over decisions made at his chambers by a justice of this court, or a judge of the District Court. The argument of the court, in the case of Bollman and Swartwout, that the power given to an individual judge may well be exercised by the court, must not be considered as asserting an original jurisdiction to issue the writ. On the contrary, the power exercised in that case was an appellate one, and the jurisdiction was maintained on that ground.

It may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of *habeas corpus*. In this form nothing more can be examined into than the legality of the commitment. However erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction, and the defendant has been duly committed, under an execution or sentence, he cannot be discharged by this writ. In criminal cases, this court have no revisory power over the decisions of the Circuit Court; and yet, as appears from the cases cited, "the cause of commitment" in that court may be examined in this, on a writ of *habeas corpus*. And this is

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done by the exercise of an appellate power,—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court. This does not conflict with the principles laid down in *Marbury v. Madison*, 1 Cranch, 137. In that case, the court refused to exercise an original jurisdiction by issuing a mandamus to the Secretary of State; and they held, that “Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution.”

There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought \*before the District or Circuit Court; consequently it cannot, in the nature of an [\*192 appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it.

Upon the whole, the motion for the writ of *habeas corpus* in this case is overruled.

## ORDER.

*Mr. Core*, of counsel for the petitioner, having filed and read in open court the petition of the aforesaid Nicholas Lucien Metzger, and moved the court for a writ of *habeas corpus*, as prayed for in the aforesaid petition, to be directed to the marshal of the United States for the Southern District of New York, commanding him forthwith to produce before this honorable court the body of the petitioner, with the cause of his detention, — on consideration whereof, and of the arguments of counsel thereupon had, as well against as in support of the said motion, and after mature deliberation thereupon had, it is now here ordered and adjudged by this court, that the prayer of the petition be denied, and that the said motion be and the same is hereby overruled.

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ALBERT G. CREATH'S ADMINISTRATOR, COMPLAINANT AND APPELLANT, v. WILLIAM D. SIMS.

The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court  
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of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence.<sup>1</sup>

Therefore, where a complainant prays to be relieved from the fulfilment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are *in pari delicto*. The complainant cannot be admitted to plead his own demerits.<sup>2</sup>

Nor is it any ground of interference when a complainant applies to be relieved from the payment of a promissory note given under the above circumstances, upon which judgment had been recovered at law. The consideration upon which the note was given was then open to inquiry, and it is a sufficient indulgence to have been permitted once to set up such a defence.

The cases examined, showing how far and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor.

Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond.<sup>3</sup>

The authorities upon this point examined.

THE reporter finds the following statement of the case prefixed to the opinion of the court, as delivered by Mr. Justice Daniel.

<sup>1</sup> CITED. *Hendrickson v. Hinckley*, 17 How., 445; *Brown v. County of Buena Vista*, 5 Otto, 181. See *Connecticut Mut. Life Ins. Co. v. Athon*, 78 Ind., 17; *Tufts v. Tufts*, 3 Woodb. & M., 456, 506.

<sup>2</sup> DISTINGUISHED. *Bateman v. Far-gason*, 2 Flipp., 663.

<sup>3</sup> A surety is not discharged by the plaintiff's giving time to the principal debtor, or even by his discontinuing of the suit commenced against the principal, without the privity and concert of the surety, unless the surety has explicitly required him to proceed against the principal, or the plaintiff has, by some agreement with the principal, precluded himself from suing him. *Fulton v. Mathews*, 15 Johns. (N. Y.), 433; *Pain v. Packard*, 13 Id., 174; *Orme v. Yonge*, Holt. N. P., 34; *King v. Baldwin*, 2 Johns. (N. Y.) Ch., 554; *Cope v. Smith*, 8 Serg. & R. (Pa.), 110; *Thursby v. Gray*, 4 Yeates (Pa.), 518; *Butler v. Hamilton*, 2 Desaus (S. C.), 226; *Bel-fort Banking Co. v. Stanley*, Ir. Rep., 1 Com. Law, 693; *Perfert v. Musgrove*, 6 Price, 111. A loss from indulgence by a creditor to a principal, which is

purely permissive, will not discharge a surety. If the creditor has disabled himself to proceed, the surety is *ipso facto* discharged; if he has not, no eventual loss from mere delay will produce that effect. *United States v. Simpson*, 3 Pa., 433; *Hunt v. United States*, 1 Gall., 34; *Warfield v. Ludewig*, 9 Rob. (La.), 240; *Moore v. Brou-sard*, 20 Mart. (La.), 18; *Force v. Craig*, 2 Halst. (N. J.), 272.

Mere delay in calling on the maker of a note for payment will not release an indorser who has waived demand and notice. *Johnston v. Searcy*, 4 Yerg. (Tenn.), 81; *Deberry v. Adams*, 9 Id., 54; *Thompson v. Watson*, 10 Id., 369; *Buchanan v. Bordley*, 4 Har. & M. (Md.), 41; *Strong v. Foster*, 17 Com. B., 201; *Humphreys v. Crane*, 5 Cal., 173; *King v. State Bank*, 9 Ark., 185. "The holder of a bill may forbear to sue the acceptor as long as he pleases, and will not thereby discharge the other parties from their liability, provided he does not agree to give time to the acceptor, without their concurrence." *Martin v. Mechanics' Bank*, 6 Har. & J. (Md.), 235, 247.

\*This is an appeal from a decree of the Circuit Court of the United States for the 9th Circuit and Southern District of Mississippi. The facts of this case, so far as it is necessary to set them forth, are as follows:—On the 25th of June, 1838, A. G. Creath, together with William N. Pinkard (who signed himself as principal), John I. Guion, and Samuel Mason, executed their promissory note to the appellee, as administrator of John C. Ridley, for the sum of \$10,392<sup>13</sup>/<sub>100</sub> payable on the 1st day of October following, at the branch of the Planters' Bank at Vicksburg in Mississippi. Upon failure to pay this note, an action was instituted thereupon, in the Circuit Court above mentioned; a judgment was recovered for the amount at the May term of the court, 1839; and upon a *feri facias* sued out upon this judgment, the marshal having returned, on the 2d of October, that he had levied upon certain slaves enumerated in his return, the parties to the promissory note, the defendants in the judgment, together with a certain T. L. Arnold, on the 2d day of October, 1839, executed to the plaintiff in the action a forthcoming or delivery bond, which has the force of a judgment, by virtue of which the property levied upon was released. The condition of this forthcoming bond not having been complied with, a *feri facias* was, on the 16th of December, 1839, sued out thereupon, and on this process the marshal, on the 24th of March, made a return that it had been levied on several lots and parts of lots in the town of Vicksburg, which were not sold by order of the plaintiff's attorney. A copy of the order referred to by the marshal is made a part of the record, and is in the following words:—"The marshal is authorized to levy on property enough of the defendants to pay the plaintiff's execution, and return the levy to court without selling or advertising for sale, unless other judgments younger than this are pressed to an amount to endanger this debt; if so, the property will have to be sold, March 24th, 1840." On the 21st of May, 1840, a *venditioni exponas* was sued out, ordering the sale of the property which had been levied upon, and on that process there was a return that there had been no sale for the want of bidders. A second *venditioni exponas* was next sued in November, 1840, and on this the marshal returned that the property had been sold on the 2d of March, 1841, and the proceeds applied to the execution. The amount made by this sale does not appear by the return of the officer, but it is stated, in the answer of the respondent, to have been \$101 only. In consequence of the insufficiency of the sale, under the last *venditioni exponas*, to satisfy the judgment, process of *feri facias*, *alias feri facias*, *pluries* and *alias plu-*

*ries fieri facias* was sued out, until the autumn of the year 1842, when the marshal, having levied upon certain real and personal estate of the said A. G. Creath, as set forth in the return of that officer, and in his advertisement for the sale thereof, the complainant, on the 25th day of November, 1842, \*194] obtained from the district judge \*of the Southern District of Mississippi an injunction to stay all proceedings upon the judgment recovered against him and others at law. The grounds set forth in the bill, and on which relief is prayed, are the following:—1st. That the complainant was a mere surety in the note on which the action was instituted, and that the indulgence granted by the direction to the marshal after judgment obtained was in fraud of defendant's rights as a surety; was in its operation, in fact, injurious to him, from the deterioration of the property of Pinkard the principal during the interval of that indulgence; was an infraction of the undertaking of the surety, and therefore absolved him from all responsibility. 2dly. That the instrument on which the judgment was obtained was one of several notes given for the purchase of a number of slaves sold by the intestate of the plaintiff to Pinkard, several of whom were unsound, although, as the plaintiff charges, they were (as he believes) warranted to be sound and healthy. 3dly. That although the slaves for which the notes were given were delivered in the State of Tennessee, yet the contract for them was in fact made at Vicksburg, in Mississippi, and was designed to be, and was in reality, a fraud upon the constitution and laws of Mississippi, forbidding the introduction of slaves, as merchandise, within that State.

The respondent denies that the complainant, Creath, could properly be regarded as a surety, either in the note on which the action at law was instituted, or in the forthcoming bond executed posterior to the judgment; but insists that in both the complainant must, with respect to the respondent, be considered as a principal, equally with the other makers of the note, or obligors in the forthcoming bond. But even could Creath be viewed as a surety, it is further insisted that he could have no just cause of complaint, because, in the short space of five weeks, during which the execution was held up, there could be no material depreciation in property of any intrinsic value; and because, moreover, the forbearance was merely voluntary on the part of counsel of the respondent, was wholly without consideration, and without any agreement for delay with either of the parties, and might have been terminated at any moment, at the will of the respondent, or at the request of either of the defendants, had

this been desired by them. The allegations in the bill of a warranty of the soundness of the said slaves, and of the making of the contract of sale within the State of Mississippi, and in fraud of the constitution and laws of that State, are, in the first instance, directly denied; and it is next insisted by the respondent, that these are objections which, if they ever had any validity, should have been urged as grounds of defence to the action at law. A copy of the bill of sale from Ridley to Pinkard and others, conveying the slaves, is made an exhibit in the cause, and upon the face of that instrument there is no warranty of any thing except of the title to the property conveyed. Several depositions were taken on \*behalf of the complainant, and some exhibits filed by [195 the respondent, but as these are deemed immaterial to the questions on which the decision of this cause properly depends, they will not be made subjects of comment. Upon a final hearing before the circuit judge, on the 15th of May, 1844, it was decreed, that the injunction awarded by the district judge on the 25th of October, 1842, should be dissolved, and the bill of the complainant dismissed with costs.

From this decree, an appeal was taken to this court.

The cause was argued by *Mr. Crittenden*, for the appellant, and by *Mr. Coxe* and *Mr. Chalmers*, for the appellee.

*Mr. Crittenden*, after stating the case, proceeded with the argument.

The question arising upon the case thus presented is, whether the complainant, as the surety of Pinkard, is discharged, in equity, from his liability as such?

The proof in the cause leaves no room to doubt that he was a surety. Being such, it is contended that the successive suspensions of the executions of the 16th of December, 1839, and of the 15th of March, 1841, discharge the plaintiff as a surety. The former execution was levied on the 24th of March, 1840, and the real estate levied on was not sold until the 2d of March, 1841, being an interval of eleven months and a few days. Contemporaneously with the date of the execution, the marshal was directed by the plaintiff's attorney "to return the levy to court without selling or advertising for sale," unless other judgments were pressed to an amount endangering the debt. The marshal returned on the execution,—“Levied this *feri facias* on lots No. 93, &c., and not sold by order of attorney.”

Another execution did not issue on the judgment until

the 21st of May, 1840, that being the date of the *venditioni exponas*.

It is clear that the stay of the execution was produced by an agreement between Pinkard, the principal, and the attorney of the plaintiff. The answer of the defendant does not deny this. On the contrary, it would seem to be admitted. For it says,—“This respondent is informed, and believes, that the only reason which influenced the attorney of record to consent to one day's time in the sale, and the only reason assigned to him by Pinkard when asking such time, was to enable Pinkard, if possible, to complete some negotiations that he had then going on, to relieve his property,” &c. “And this respondent believes he (the complainant) well knew that said Pinkard and the attorneys of record in this and other cases were trying to aid him, Pinkard, to get through his difficulties,” &c.

Proof to the same point is contained in the deposition of \*196] Pinkard. \*He says,—“The stay of execution was granted at my request, and the only consideration that I knew for granting it was, that the attorney, F. Norcom, who granted it believed I would be able to pay it in a short time, as he knew it was the first levy that had ever been made on my property, and that he considered it ample to pay every dollar against me under any circumstances.”

If, however, it should be supposed that the evidence does not establish an agreement for the delay, the foregoing statement of the witness, together with other proof to which the attention of the court will be called, sufficiently maintains a position, that, by the postponement of the sale, the risk of the surety was materially increased, and the property levied on, which he had a right to rely on for his indemnity, was greatly depreciated in value.

The bill charges, that “the property on which the execution was levied, together with other property of Pinkard's not levied on, was, at the time of the levy, and until after the return term of the execution, amply sufficient to pay, not only this judgment, but all other judgments and liens of prior date to the time when the lien of this judgment took effect; and had said sale been made, said judgment would have been satisfied out of the property of said Pinkard.”

It also charges, “that after the return term of the execution by which said property was levied on, it became (as indeed all real property had) greatly depreciated in value, in consequence of commercial embarrassments and other causes, and there being other judgments, of younger date,



against said Pinkard, the effect of the suspension of said sale was thought by many to give those younger judgments the preference,—at least the doubt which this suspension created on this point caused said property, which was sufficient at the time of the levy to have twice paid the judgment, to sell for little or nothing.”

In support of these allegations of the bill; the undersigned refer the court to the deposition of Pinkard. The deponent states,—“There were two stays given on the execution by F. Norcom, attorney for W. D. Sims, administrator of John C. Ridley's estate, at my request, without the knowledge or consent of Creath, and the sureties in the case. The first was given in writing on the execution at the marshal's office, in Vicksburg, on the 4th of March, 1840, erased,”—“the second was given between the 15th of March and the first Monday of May, 1841.” “I had sufficient property at the time the stay was given to pay five times the amount of judgments then against me; and I could, if the execution had been pressed, at any time within two weeks of the time the suspension was granted, have raised the money to pay it, as the counsel granting the stay was perfectly satisfied at the time.”

“The effect of the stay was to cloud the title to the property levied on in this case, and cause doubts in the minds of the best attorneys, whether the executions which had [\*197 taken their regular course had not a preference lien in every instance where they had not been paid, which would not have been the case if the suspension had never taken place. These doubts in the minds of purchasers operated seriously against the sale of the property when it was finally offered.”

Again, the same deponent says,—“If said stay had not been granted, I would and could have paid the money rather than the property should have been sold, but the stay operated so seriously against me, that when the property was sold it was impossible for me to protect it.”

“At the time the sale was made, Major Milkie was anxious to purchase the property” (one half at \$16,000, and General Vick was in treaty for lots 93 and 94 at \$32,000, one half in Planters' Bank money, the balance in good funds); “and was deterred from doing so owing to the advice of Mr. Yerger, who gave as his opinion that he could not get a title, owing to the stay given on said execution.”

This evidence, connected with the additional statement of the deponent, that, “at the time the stay was granted, the amount of liens older than this judgment was comparatively

small, not exceeding \$20,000," shows very clearly that the interests of the complainant were materially affected by the suspension of the execution; and that if the property had been regularly sold, it would have brought much more than it produced on the final sale. The court will not inquire into the degree of the injury received by the surety, for that would lead, in the language of Lord Loughborough (*Rees v. Berrington*, 2 Ves., 543), "into a vast variety of speculation, upon which no sound principle could be built." Nor will the court, it is contended, look into the encumbrances upon the property, alluded to in the defendant's answer, with a view of determining the liability of this surety. Pinkard's testimony is ample to show, that at all events, if the sale had taken place, the debt for which the complainant was bound could have been made; not only was the property itself sufficient, but Pinkard asserts he would have paid the money rather than it should have been then sold. The complainant was entitled to the benefit of these chances. The creditor, with an execution levied, was a trustee for all the parties interested in the subject-matter concerning which such execution was taken out. *Pitman*, Pr., 177; *Mayhew v. Crickett*, 2 Swanst., 185.

Upon the proof in the cause, therefore, it is contended, that the complainant is released from his obligation as surety. The authorities are fully to the point.

The rule was distinctly recognized in *Rees v. Berrington*, 2 Ves., 440. Lord Loughborough said in that case,—“It is the clearest and most evident equity, not to carry on any \*198] transaction \*without the privity of him (meaning the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own), without consulting him.” “The authorities fully warrant me in this; though I should have granted the injunction, even without that strong authority before Lord Thurlow.” “There the creditor,” “thinking that by leaving the debtor at large, and taking a judgment against him, which affected all his property, he pursued a better mode, using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit, and holding him in prison. But he did it without consulting the surety; and therefore Lord Thurlow held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous; after circumstances of communication, that showed great embarrassment, great difficulty, and

great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man who had so great an interest."

A question, similar in principle, arose in the case of *Mayhew v. Crickett*, 2 Swanst., 193, in which the Lord Chancellor said,—“I always understood that, if a creditor takes out execution against the principal debtor, and waives it, he destroys the surety, on an obvious principle which prevails both in courts of law and in courts of equity,” for “the principle is,” he observed in another place, “that he is a trustee of his execution for all the parties interested.”

In the case of *Bullitt's Executors v. Winstons*, 1 Munf. (Va.), 269, the Court of Appeals of Virginia had occasion to allude to the question now before us; and Judge Tucker held, that a plaintiff, by directing the sheriff to put off the sale of property taken in execution to a day after the return day, and to suffer it to remain in the possession of the principal, releases the sureties altogether from that or any subsequent executions, such direction being given without their concurrence.

The case of *Jones v. Bullock*, 3 Bibb (Ky.), 467, is directly to the same effect. There the party interested in an execution directed it to be stayed after it had been levied. The court say,—“The execution which was levied upon the property of the principal debtors was postponed by the creditor without the privity or consent of the complainants. This course of proceeding evidently tends to their prejudice as securities; and it is a principle recognized by courts of chancery, and perfectly consonant to the dictates of natural justice, that any arrangement between the creditor and principal debtor, for the easement of the latter, and to the prejudice of the securities, will, if the securities are not privy to or approve of such arrangement, operate in equity to release them from their responsibility.” And the court directed a decree, making the injunction of the surety to the judgment perpetual.

\*In the *Bank of Steubenville v. Carroll*, 5 Ohio, 207; [\*199 *S. P. Bank of Steubenville v. Hoge*, 6 Id., 17, the court held, that if the principal at the instance of the creditor confess a judgment with a stay of execution, the sureties are discharged.

I will merely direct the attention of the court, without comment, to the question presented by the record as to the consideration of the note on which the judgment was rendered.

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On the whole, it is submitted that the decree of the Circuit Court is erroneous, and ought to be reversed.

*Mr. Coxe and Mr. Chalmers*, for the appellee.

The errors alleged in the decree, so far as we can learn them from the record, are supposed to be three.

1. That complainant Creath was exonerated from his responsibility by the postponement of the sale of Pinkard's property, which had been levied upon under the execution issued upon the judgment obtained upon the forthcoming bond.

2. That the original contract for the sale of the negroes made by Colonel Ridley, and for part of the purchase money of which the note in which this suit originated was given, was null and void, on the ground of fraud in the vendor in making the sale, either because of his false representation as to the soundness of the slaves when sold, or because of his having made an actual warranty of such soundness, which was broken.

3. That the original contract as aforesaid was void, because of the violation of the provision of the constitution of Mississippi, prohibiting the importation of slaves.

The decree of the Circuit Court does not show upon its face whether these grounds were overruled, because not supported in point of fact, or because under the circumstances they were not deemed to constitute a legal defence to the action. In vindicating the correctness of this decree, the counsel for the appellee feel themselves fully authorized to sustain it as well upon the law as the facts. They therefore insist, that neither of these grounds of defence is established by the proof in the cause; and, secondly, not under circumstances which justify the interposition of a court of equity to prevent a party who has obtained a judgment at law from having the full benefit and effect of such judgment.

I. The alleged suspension of the execution which had been levied upon the property of Pinkard.

1. It appears from the record, that Sims brought his action in the Circuit Court at the May term, 1838, against sundry defendants upon the same promissory note. The declaration in this case sets forth a joint promise by Pinkard, as principal, Creath, Guion, and Mason, as sureties, on the 25th June, 1838, to pay on the 1st October, 1838, to the plaintiff, or order, the sum of \$10,392.57, and it avers a joint responsibility on  
 \*200] all the parties defendants. \*The defendants all united  
 in the plea of the general issue, and upon the trial the

jury found a general verdict against all, upon which judgment was entered.

Upon this judgment a writ of *feri facias* issued against all the defendants jointly. Upon this writ the marshal returned a levy upon sundry slaves, and that he had taken a forthcoming bond, with Thomas L. Arnold as surety, which bond is set forth in the record.

This bond having been forfeited, another *feri facias* issued against all the parties, including all the defendants in the original suit, together with Arnold, the security, but without designating him as such. The marshal returned, that he had levied upon certain real estate, designated, "not sold by order of attorney." The levy does not indicate to which of the defendants the property levied on belonged, and the order of plaintiff's attorney, set forth in the bill, and in the transcript of record, does not name any one of the defendants to whom indulgence was to be granted. Whatever favor was granted would seem to have been extended equally to all. This order, as well as the levy, bears date 24th March, 1840. May 21, 1840, a *venditioni exponas* issued in like manner, without distinction of parties, which was returned,—“Not sold for want of bidders.” An *alias* issued on the 3d December, 1841, which was returned,—“Sold to S. S. Prentiss, and proceeds applied.” March 15th, 1841, a *pluries* issued, which was stayed as against the other defendants. June 8, 1841, an *alias pluries* issued, to which the marshal returned a levy on certain specified property of Pinkard. Subsequent process was issued, but the *feri facias* which was enjoined does not appear in the record.

The only act complained of as an undue act of forbearance, or giving of time, is that of March 22d, 1840; *quære*, if not March 24, 1840. This obviously was in no respect detrimental to complainant. It was an indulgence, if any, equally extended to all the defendants; and if any contract of forbearance is to be inferred from it, all were parties; neither has cause of complaint. But what was then the position of the parties? A judgment at law had been obtained against all jointly. The responsibility of each was then fixed. The plaintiff was at perfect liberty to issue an execution, or to withhold it, to issue against all or any, to compel payment of his debt from any or either.

Even if the engagement of Creath was a subsidiary one at any time, which is denied, it had become absolute and primary by the rendition of the first judgment against him. The right of the plaintiff was perfected. He might now pursue his remedy against either or all, and the omission to proceed

against one, or even a positive indulgence granted to one, would in no decree impair his rights as against any other.

But the strength of the appellee's case does not rest here. He did take out execution; he caused a levy to be made; \*201] and \*complainant again, with his associates, enters into a new and solemn instrument, under hand and seal, in the shape of a forthcoming bond. This bond created a new and substantive contract; and, being forfeited, gave rise to another judgment, comprehending all the parties to it. Again, plaintiff had a perfect right to proceed against one or all; to direct the marshal to levy upon any property of any one of the defendants. He did issue execution, a levy was made, a sale advertised, when complainant resorted to equity, and obtained an injunction. The first question arising in the case is, whether the original direction given to the marshal, prior to the forthcoming bond, to the forfeiture of that bond, the judgment upon it, and the issue of the *feri facias*, invalidate all these subsequent proceedings, and discharge complainant's liability.

For the appellee it is contended, that no such legal or equitable consequences result.

1. Because, by the terms of the original note, all the parties were equally bound, jointly and severally. There was no primary responsibility in one, or a contingent and subordinate responsibility in the other.

2. Because, even had such been the case, by the judgment all became principals. Even in the case of indorsers, whose contract is confessedly conditional and contingent, such is the law. *Lenox v. Pavert*, 3 Wheat., 525, is express upon this point. It was there held, that, when judgment has been obtained against the drawer and indorser, both become principals; and the creditor ought not to be restrained by any fear of exonerating the indorser from countermanding the service of any execution he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. But it is obvious, that in this case the designation in the original note of one of the parties does not have this effect. 5 Johns. (N. Y.) Ch., 315. In the case of *Bay v. Tallmadge*, which was, in many particulars, analogous to the present, but in which bail, who are always especially favored, sought to be exonerated in consequence of the postponement of proceedings against their principal, Chancellor Kent says, "that even an express dissent by the bail will not discharge them from their obligation to pay the judgment against them. Their privileges as bail were lost, and they had become fixed as principal debtors." I am not aware of any case that has ever

imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes, then, too late to inquire into the antecedent relations of the parties. Those relations become merged in the judgment.

The case of *Rees v. Berrington*, 2 Ves., 540, is a leading case upon this point, and the cases cited in the note to that case (Phil. ed.) fully illustrate the distinctions which exist.

\*3. The act complained of was not one which, in [\*202 any case, and with the most rigid application of the most favorable decisions in favor of sureties, would operate a discharge. No peculiar benefit is granted to the so-called principal. No especial forbearance as regards him. The order is general as to all the defendants in the execution.

Nor was there any agreement obligatory on the parties to grant indulgence to the principal debtor. In *Reynolds v. Ward*, 5 Wend. (N. Y.), 501, it was held that an agreement, without consideration, by a creditor with a principal debtor, enlarging the time for the payment of a note, does not discharge the surety.

*Bank of Utica v. Ives*, 17 Wend. (N. Y.), 501. Indulgence to the maker of a note, on receipt of security from him, does not discharge the indorser, where there is no valid agreement extending the time for payment for a definite period. Nelson, C. J., in this case, distinctly says,—“Mere indulgence at the will of the creditor, extended to the debtor, in no way impairs the obligation of the surety. If it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is well settled, there must be a valid common law agreement to give time, founded of course upon a good consideration, to have this effect.”

In *M'Lemore v. Powell*, 12 Wheat., 554, this court, after a review of the authorities in the case of an indorser while holding merely that character, held that a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is no discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawer and due notice to himself.

If such be the law, as thus laid down by the unanimous voice of this court, and the authority of this decision has never been questioned, *a fortiori* the complainant in this case was not discharged by the facts which he avers in his bill; as between himself and the creditor he never occupied the posi-

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tion of a surety. The designation of the relative characters of the parties to the note was simply to indicate their relative rights and obligations as among themselves, to confer upon the sureties the right of complete indemnification as against their principal, and of contribution among themselves. The order of the attorney to the marshal, upon which complainant relies, is destitute of every feature and character which has hitherto been regarded by courts as requisite to operate the results sought to be deduced from it.

If further answer be required upon this point, it will be found in the fact that the objection comes too late. If ever available, it should have been urged before the issue of the execution upon which the forthcoming bond was given, before judgment had upon that bond,—the forfeiture of which was \*208] a satisfaction and \*extinguishment of the original judgment; *King v. Terry*, 6 How. (Miss.), 513; *The United States Bank v. Patton*, 5 Id., 200,—before the execution against which the injunction was prayed. With full knowledge, complainant omitted to avail himself of a defence, which was equally effective at law as in equity, and he is concluded. 2 Story, Eq., 179; 1 Johns. (N. Y.) Ch., 465; 9 Wheat., 552.

II. The next ground is, that Redley, Sim's intestate, perpetrated a fraud in the sale of the negroes, for whose payment this debt was originally incurred.

The particular point of this objection is not very apparent. The bill says that Redley represented fraudulently, as complainant has been informed and believes, all said slaves to be perfectly sound and healthy, and warranted them, as he has been informed, to be sound and healthy. Whether the sale is sought to be avoided on account of the alleged false and fraudulent representation, or on the ground of the breach of an express warranty of soundness, is not made distinctly to appear.

It is manifest that the purchaser never rescinded, or sought to rescind, the sale, on any pretence that it was vitiated by fraud; he holds on to the property purchased, pays through the enforcement of the law a part of the purchase money, and now, after six years of acquiescence, this ground is brought forward in a court of equity. The bill of sale of the negroes contains no covenant of warranty, and completely falsifies the pretence that one was given; nor was the appropriate remedy, by action for breach of such covenant, ever resorted to.

2. It is wholly unsupported by any evidence in the cause.

3. It appears by the record of the suit, that the then defendants, in an action at law upon one of these notes, endeavoured to avail themselves of the same defence, but wholly



failed, and a verdict and judgment were rendered against them. See *Groves v. Slaughter*, 15 Pet., 449, which has been again affirmed during the present term.

4. In regard to this particular note, the parties when sued at law omitted to avail themselves of this defence, and are now precluded from making this the ground of invoking the aid of chancery. See authorities before cited, and see the case of *Green v. Robinson*, 5 How. (Miss.), 80, on the exact point, and *Cowen v. Boyce*, Id., 769.

III. The last objection is, that Redley made this contract in violation or evasion of the provision in the constitution of Mississippi.

This ground of appeal to chancery comes with a bad grace from parties who have continued to hold the property purchased for a period of six years, without their title being questioned on the ground of an illegal importation. But this point admits of the same answer which has just been given to the former point. It has been once \*tried at law and overruled. It was not urged in this case on the trial at law, and it is now too late to make it a ground for equitable relief.

In brief, the whole of these objections involve a palpable mistake of the grounds of equitable relief. Chancery will relieve from the effect of a judgment at law which has been obtained by fraud; but it is believed no case can be found in which, after judgment has been obtained at law, which judgment is unimpeachable for fraud, a court of equity has gone behind the judgment, and looked into the character of the contract in which that suit originated.

Upon the whole, and on every ground upon which equitable relief is sought, it is confidently submitted that the decree of the Circuit Court ought to be affirmed, with ten per cent. damages.

Mr. Justice DANIEL, after having read the statement of the case prefixed to this report, proceeded to deliver the opinion of the court.

In reviewing the grounds relied on by the complainant as the foundation of his claim to relief, the second and third, being coincident with the order and progress of the transactions between the parties as stated in the bill, and evincing especially the circumstances and the attitude under which this approach to a court of equity has been made, will be first considered, and this examination will be premised by stating the following principles of equity jurisprudence, which may be affirmed to be without exception;—that whosoever would

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seek admission into a court of equity must come with clean hands ; that such a court will never interfere in opposition to conscience or good faith ; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defence shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. The effect of these principles upon the statements of the complainant is obvious upon the slightest inspection. The complainant alleges, that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfilment. This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this;—that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto* ; you cannot be admitted here to plead your own demerits ; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you.<sup>1</sup> And so with respect to the omission by \*205] the complainant to set up at law either the failure or the illegality of the consideration for which the note was given ; no reason is perceived why such a defence should not have been made or attempted. The action at law was founded upon a simple promissory note, a *parol* contract in legal intendment, and not upon a speciality ; the consideration was fully open to investigation, and it was surely a sufficient indulgence to the payees of that note to have been permitted *once* to set up a defence by which payment may have been resisted, whilst the whole consideration received by them for their undertaking would have been withheld, and absolutely possessed and enjoyed by them. But these payees of the note did not stop even here. After the first judgment recovered against them, and after the levy of an execution sued out on that judgment, they voluntarily go forward, the complainant amongst them, execute to the respondent their forthcoming bond, equivalent in effect to a confession of a second judgment, and after these repeated and conclusive

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<sup>1</sup> FOLLOWED. *Sample v. Barnes*, 14 *Thomas v. Brownsville &c. R'y Co.*, 1 *How.*, 74 ; *Walker v. Robbins*, Id., 586 ; *McCrary*, 395 ; *West. Union Tel. Co. v. Crim v. Handley*, 4 *Otto*, 658. And see *Union Pacific R'y Co.*, Id., 428.

recognitions of their liability, they invoke the aid of a court which repels whatever is unfair, or even illiberal, to declare that these proceedings, thus solemnly had and evidenced of record, shall be utterly null; that the respondent shall be stripped of his property without the promised equivalent, and that property be secured, if not to the complainant, to one with whom he was associated in effecting its relinquishment by the owner.

Recurring now to the first ground for relief set up in the bill, being that on which greatest stress is laid,—viz., the suretyship of the complainant, and the wrong alleged to have been done him by a change of his position and responsibility, by the indulgence extended to his codefendant Pinkard,—let us test this ground, first, by the proofs upon the record, and next, by trying the accuracy of the deductions attempted to be drawn from them. The promissory note, on which the action at law was founded, is made an exhibit, and it appears that to the name of Pinkard, the first signer of that note, there is added the word “principal,” and to the name of each of the other makers is added the word “surety.” It is insisted by the respondent, that these designations upon the note had no effect upon the obligations of these parties to him, however it might be supposed to operate upon their relations with each other;—that with respect to the respondent all the makers of the note were from the beginning principals, but that at any rate, after their liability was fixed by judgment upon the note, and still more after their uniting in the forthcoming bond, in the nature of a second judgment, their equal responsibility as principals was irrevocably settled. In connection with this view of the case it may not be irrelevant here to remark, that by the statute of the State of Mississippi, promissory notes, though it be not so expressed upon the face of them, are declared in their legal effect to be joint and several. See How. & H. Stat. of Miss., 578. The proposition contended \*for by the [\*206 respondent, were it necessary here to pass upon it, would not be found without support from decided cases. Thus, for instance, it was ruled by Chancellor Kent in *Bay and others v. Tallmadge*, 5 Johns. (N. Y.) Ch., 305, that where bail become fixed with the payment of the debt of the defendant, their character of bail ceases; that after judgment and execution against bail and sureties, there is an end of the relation of principal and surety, and the bail cannot claim any advantage against the creditor on the ground of want of diligence in prosecuting the principal debtor. In *Prout v. Lennox*, 3 Wheat., 520, it is laid down by Livingston, Justice, in

delivering the opinion of the court, that "the indorser of a note, who has been charged by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety. But without pushing further an investigation which is unnecessary to the decision of the case before us, let it be conceded that the complainant was strictly a surety in the note on which the judgment was obtained at law; have any of his rights been impaired, or have any new rights grown up to him, springing from the conduct of the respondent or his agents in reference to that judgment and the proceedings had thereupon? The directions given by the attorney for the plaintiff in the judgment have been set out *in extenso*. These directions express upon their face no consideration received or promised for the forbearance,—no limitation upon the right of the plaintiff at law to proceed upon his execution,—no condition or stipulation of any kind; nor is there a tittle of proof as to the existence of any such consideration, limitation, or agreement, expressed or understood. We see nothing in the case but a voluntary forbearance, which the plaintiff was at perfect liberty to terminate at his pleasure. What say the authorities in relation to a proceeding of this character? In the case of *Rees v. Berrington*, 2 Ves., cited and pressed in the argument, the interposition of the chancellor was founded upon the ground of *an actual and substantive change* of the relation and responsibility of the surety, and in such a case his lordship very justly observed, that he would not undertake to calculate the degree of injury which might have flowed from it; that if the situation had in fact been changed, that was sufficient to release the surety altogether, for it was an attempt to impose on him a responsibility he had never assumed; but in the case before us was there any such change wrought by a mere voluntary forbearance, creating no obligation anywhere,—contracting with nothing, nor with any person? A few of the numerous cases, both at law and in equity, which are applicable to this question will be adduced.

*Reynolds v. Ward*, 5 Wend. (N. Y.), 501. It was ruled, that an agreement *without consideration*, enlarging the time of payment, was not a discharge of the surety to the note. So held on demurrer to a plea by surety, averring that at the time when the note became due the principal was able to pay, \*207] and would have paid had not the \*time been extended, and that after the note fell due the principal became insolvent. Held also, in that case, that a promise to pay interest during the time of forbearance was no consideration for such agreement.

*Bank of Utica v. Ives*, 17 Wend. (N. Y.), 501. Indulgence to the maker of a note, on *receiving securities* from him, does not discharge the indorser, where there is no valid agreement for giving time of payment for a definite period; and *per* Nelson, Chief Justice, in this case,—“Mere indulgence at the will of the creditor, extended to the debtor, in no way discharges the obligation of the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is a settled rule, that there must be a valid common law agreement to give time, founded of course on a good consideration, to have this effect.”

*Norris v. Crummie*, 2 Rand. (Va.), 328. It is ruled, that indulgence granted by a creditor to the principal debtor will not discharge the sureties of such debtor, unless the creditor shall have bound himself in law or in equity not to pursue his remedy against the principal for a definite length of time.

*Hunter's Administrators v. Jett*, 4 Rand. (Va.), 104. A surety will not be discharged by indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law; nor will the surety be discharged even then, if the indulgence shall have been given with his knowledge and assent.

*McKinney's Executors v. Waller*, 1 Leigh (Va.), 434. A mere indulgence to a principal debtor by a creditor, not binding him to suspend his proceedings for any time, though such indulgence be given at the very time the sheriff is about to levy execution on the property of the principal, and although in consequence of that indulgence the principal debtor has been enabled to remove his property out of the reach of future process, was not, even in equity, a discharge of the surety.

*Alcock v. Hill*, 4 Leigh (Va.), 622. A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he no wise binds himself to suspend execution for any definite time; the principal and all the sureties but one become insolvent; and then the creditor sues out execution against the solvent surety. Held that the surety is not entitled to relief in equity. The requisites in that case stated as indispensable for absolving the surety are, first, a consideration; second, a promise to indulge; third, the definite nature of such a promise; and, fourth, the absence of assent by the surety.

The last case which will be cited on this point is that of

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*M'LeMore v. Powell et al*, 13 Wheat., 554, in which it was ruled by this court, that an agreement between a creditor \*208] and the principal \*debtor for delay, or otherwise changing the nature of the contract, in order to discharge the surety, must be an agreement having a sufficient consideration to support it and be binding upon the parties. There is not one of the authorities above cited which does not more than cover the predicament presented by the case under consideration. Those authorities furnish examples of agreements,—arrangements between creditor and debtor,—situations from which something like hardship might possibly spring. In the present case, there is neither contract, arrangement, nor even a scintilla of right, on which either law or equity can lay hold. The complainant, after permitting a judgment on the note, without attempting a defence at law, and after execution was levied upon the judgment, voluntarily united in withdrawing the effects of his associate from the operation of that process, and by this very act bound himself with the force of a second judgment for the validity and for the satisfaction of the demand. After this course of conduct, he addresses himself to a court of equity, praying that court to undo all that he has voluntarily and deliberately performed, and in order to accomplish this end, he seeks to stamp his own acts with illegality from their very inception. For such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles. We hold the decree, therefore, of the Circuit Court, dissolving the injunction awarded the complainant below, and dismissing his bill with costs, to be correct; and that decree is accordingly affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

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The United States v. Briggs.

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## THE UNITED STATES, PLAINTIFF, v. EPHRAIM BRIGGS.

When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated.<sup>1</sup> Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained.

THIS case came up from the Circuit Court of the United States for the District of Michigan, on a certificate of division in opinion.<sup>2</sup>

The circumstances of the case are thus stated by the Chief Justice, as introductory to the opinion of the court.

\*This case comes before the court upon a certificate of division from the Circuit Court of the United States for the District of Michigan. [\*209

The defendant was indicted under the act of Congress of March 2, 1831, ch. 66 (4 Stat. at L., 472), for unlawfully cutting timber upon certain lands of the United States, called the Wyandotte reserve. He demurred to the indictment upon the following grounds:—

First. Because the offence stated and set forth in the indictment is not an offence under the statute of the United States, punishable criminally by indictment.

Second. Because, under the statutes of the United States, trespass on the public lands of the United States is, in no case, an offence punishable criminally by indictment; but is

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<sup>1</sup> CITED. *Dennistown v. Stewart*, 18 How., 568; *Daniels v. Railroad Co.*, 3 Wall., 255.

The only mode of bringing a criminal case into the Supreme Court is upon a certificate of the judges of the Circuit Court that their opinions are opposed upon a question raised at the trial. *Ex parte Gordon*, 1 Black, 503.

No party has a right to ask for such a certificate, nor can it be made consistently with the duty of the court, if the judges are agreed, and do not think there is doubt enough upon the question to justify them in submitting it to the judgment of the Supreme Court. *Ib.*

In some cases, where the point arising is one of importance, the judges of the Circuit Court have sometimes, by consent, certified the point to the Supreme Court, as upon a division of opinion, when in truth

they both rather seriously doubted than differed about it. *United States v. Stone*, 14 Pet., 524.

The certificate of the judges leaves no doubt that the whole cause was submitted to the Circuit Court by the motion of the counsel of the prisoner. It has been repeatedly decided that the whole cause cannot be adjourned on a division of the judges. *United States v. Bailey*, 9 Pet., 267.

The Supreme Court cannot take cognizance, under the judiciary act of 1802, of a division of opinion between the judges of the Circuit Court upon a motion to quash an indictment. *United States v. Rosenburgh*, 7 Wall., 580; *United States v. Daniel*, 6 Wheat., 542; *United States v. Avery*, 13 Wall., 251.

<sup>2</sup> For a further decision in this case, see 9 How., 351.

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either a mere trespass, punishable by action of trespass at common law, or by action of debt in the statute.

Third. For that the said indictment is in other respects informal, insufficient, and defective.

The United States joined in demurrer; and the record states, that the demurrer coming on to be heard, and having been argued by counsel on either side, the opinions of the court were opposed as to the point whether said demurrer should be sustained; and thereupon it was ordered that the cause be certified to this court on the indictment, demurrer, and joinder thereto.

The cause was argued by *Mr. Clifford* (Attorney-General) and *Mr. Norvell*, on behalf of the United States.

Mr. Chief Justice TANEY, after stating the case as above, proceeded to deliver the opinion of the court.

The act of Congress of April 29, 1802, ch. 31, § 6, provides, that whenever a question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point on which the disagreement shall happen, upon the request of either party, shall be stated, and certified to this court, to be finally decided. It is this act alone that gives jurisdiction to the Supreme Court in cases of division of opinion in the Circuit Court, and the jurisdiction thus given must of course be exercised in the manner pointed out in the law. Consequently, we are not authorized to decide in such cases, unless the particular point upon which the judges differed is stated and certified. *United States v. Bailey*, 9 Pet., 272; *Adams v. Jones*, 12 Id., 213; *White v. Turk and others*, Id., 238.

Now in the case before us, the question upon which the disagreement took place is not certified. The difference of opinion is indeed stated to have been on the *point* whether the demurrer should be sustained. But such a question can \*210] hardly be called a point in the case, within the meaning of the act of Congress; for it does not show whether the difficulty arose upon the construction of the act of Congress on which the indictment was founded,—or upon the form of proceeding adopted to inflict the punishment,—or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer, and joinder, leaving this court to look into the record, and determine for itself whether any sufficient objection can be made in bar of the prosecution;



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and without informing us what questions had been raised in the Circuit Court, upon which they differed.

Neither can this omission in the certificate be supplied by the causes of demurrer assigned by the defendant. The judges do not certify that they differed on the points there stated, or on either of them, and indeed the third ground there taken is as vague and indefinite as the certificate itself, and could not therefore help it, even if it could be invoked in its aid.

But we are bound to look to the certificate of the court alone for the question which occurred, and for the point on which they differed, and as this does not appear, we have no jurisdiction in the case, and it must be remanded to the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; and it appearing to this court, upon an inspection of the said transcript, that no point in the case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

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JOHN C. SHEPPARD AND OTHERS, PLAINTIFFS IN ERROR,  
v. JOHN WILSON.

Where a writ of error was allowed, the citation signed, and the bond approved, by the chief justice of the Territorial court of Iowa, it was a sufficient compliance with the statutes of the United States.

Under the acts of 1789 and 1792, the clerk of the Circuit Court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation, and approve the bond.<sup>1</sup>

\*The act of 1838, providing that writs of error, and appeals from the final decision of the Supreme Court of the Territory, shall be allowed [\*211 in the same manner and under the same regulations as from the Circuit

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<sup>1</sup> For a further decision in this case, see 6 How., 280.

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Court of the United States, gives to the clerk of the Territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond.

*Mr. Grant* moved to dismiss the writ of error in this case, upon two grounds.

1st. Irregularity in the allowance of the writ of error, and the citation.

2d. That since the rendition of the judgment Iowa had become a State, and cited 3 How., 534; 4 Id., 590.

*Mr. C. Coxe* opposed the motion. He stated that the writ of error had been allowed, the citation signed, and bond approved, all by a judge of the Supreme Court of the Territory of Iowa. He then referred to the acts of 1792 and 1838, and contended that there was no irregularity.

*Mr. Hastings* controverted these views, and sustained the motion to dismiss.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought up by a writ of error to the Supreme Court of the Territory of Iowa.

A motion has been made to dismiss it, upon the ground that the writ of error was allowed, the citation signed, and the bond approved, by the chief justice of the Territorial court, and not by one of the justices of a Circuit Court of the United States, or a justice of the Supreme Court, as required by the act of 1789, ch. 20, § 22.

The act of 1838, ch. 96, § 9, under which this writ of error is brought, provides that writs of error and appeals from the final decision of the Supreme Court of the Territory shall be allowed and taken to this court in the same manner and under the same regulations as from the Circuit Court of the United States, where the value in controversy shall exceed one thousand dollars. And the act of 1789, which regulates writs of error from the Circuit Court, requires the citation to be signed by a judge of the Circuit Court in which the judgment was rendered, or by a justice of the Supreme Court; and that the judge or justice signing the citation shall take good and sufficient security for the prosecution of the writ of error, and the payment of the damages and costs if the plaintiff in error shall fail to make his plea good. And the act of May 8, 1792, ch. 36, § 9 (1 Stat. at L., 278), authorizes the clerks of the Circuit Court to issue writs of error in

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the same manner as the clerk of the Supreme Court might have issued them under the act of 1789.

Under these two last-mentioned acts of Congress, the judgment of a Circuit Court may be brought up for reëxamination to the \*Supreme Court, by a writ of error, issued by the clerk of the court in which the judgment was rendered, and the citation may be signed and the bond approved by a judge of the said court. And as the district judge is a member of the Circuit Court when sitting for his district, he may sign the citation and approve the bond. The act of 1838 having declared that writs of error may be prosecuted from the judgments of the Supreme Court of the Territory of Iowa to this court, in the same manner and under the same regulations as from Circuit Courts of the United States, it would seem to be very clear that the writ of error may be issued by the clerk of the Territorial court, and the citation signed and the bond approved by one of the judges. This is the plain import of the words of the law; and we think they cannot justly receive any other interpretation. There is certainly nothing in the object and purpose of the act of Congress calculated to create any doubt upon this subject, or to call for a different construction. For it can hardly be supposed that Congress intended to deny to suitors in the Territorial courts the conveniences and facilities which it had provided for suitors in the courts of the United States when sitting in a State, and to require them to apply to the clerk of the Supreme Court for a writ of error, and to a justice of the Supreme Court to sign the citation and approve the bond, when these duties could be more conveniently performed by the clerk and a judge of the court of the Territory,—and indeed far better and more safely performed, as regards the approval of the bond, since the judge of the Supreme Court would have frequently much difficulty in deciding upon the sufficiency of the sureties in a bond executed in a remote Territory. The construction contended for would in its results be very nearly equivalent to an absolute denial of the writ of error. We think it cannot be maintained, and that the writ of error in this case was lawfully issued by the clerk of the Supreme Court of the Territory, and the citation and bond properly signed and approved by the chief justice of the court.

Another objection was taken upon the motion to dismiss. It was insisted, that, Iowa having been admitted into the Union as a State since the writ of error brought, the act of 1838, regulating its judicial proceedings as a Territory, is necessarily abrogated and repealed; and consequently there

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is no law now in force authorizing this court to reëxamine and affirm or reverse a judgment rendered by the Supreme Court of the Territory, or giving this court any jurisdiction over it. This difficulty has, however, been removed by an act of Congress, passed during the present session (and since this motion was made), which authorizes the Supreme Court to proceed to hear and determine cases of this description.\* And as this objection no longer exists, and the writ of error, citation, and bond appear to have been regularly issued, signed, and approved, the case is legally and properly in this court, and the motion to dismiss must be overruled.

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\*ORDER.

On consideration of the motion made by *Mr. Grant*, on a prior day of the present term, to dismiss this writ of error, and of the arguments of counsel thereupon, had as well against as in support of the said motion, it is now here ordered by this court, that the said motion be and the same is hereby overruled.

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MINERS' BANK OF DUBUQUE, PLAINTIFFS IN ERROR, v. THE UNITED STATES EX REL. JAMES GRANT.

A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court.

Information in the nature of a *quo warranto*, calling upon the President, Directors, and Company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise.

Plea, referring to an act of incorporation.

Replication, that the act of incorporation had been repealed.

Rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise.

Demurrer to the rejoinder.

Joinder in demurrer.

Sustaining the demurrer, without any further judgment of the court, did not

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\* This is an error. The court refrained from pronouncing its opinion in this case, and also in one from Florida, until Congress might pass an act to supply the omission of previous legislation in relation to writs of error and appeals from their Territorial courts upon judgments and decrees rendered before their admission into the Union as States. An act was passed as the court understood, with this view, and then the above opinion was given. But it appears, that, owing, it is supposed, to some misapprehension, the act provides for Florida and Michigan, and Iowa is not included in it. Act of Feb. 22, 1847, ch. 17. There is, therefore, no law relating to Iowa.

This note has been shown to and approved by the Chief Justice, who delivered the opinion of the court.

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prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment.  
The writ of error must, upon motion, be dismissed.<sup>1</sup>

A MOTION was made by *Mr. Grant* and *Mr. Hastings* to dismiss the writ of error in this case, upon the same grounds as in the preceding case of *Sheppard and others v. Wilson*, and upon the additional ground, that the judgment in this case was not a final judgment.

*Mr. Webster.* If it was not a final judgment, the court below is abolished, and the counsel on the other side may make whatever use they can of the record.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been brought here by a writ of error to the Supreme Court of the Territory of Iowa. A motion has been made to dismiss the writ upon several grounds, and among others, upon the ground that the judgment of the Territorial court is not a final one; and therefore, under the act of June 12, 1838, ch. 96, § 9 (5 Stat. at L., 238) cannot be brought here for revision by writ of error.

It appears that an information in the nature of a *quo warranto* was filed by the United States in the District Court of Iowa, against certain persons named in the information, who are now the plaintiffs in error, charging them with having used the liberties and \*franchises of President, Directors, [\*214 and Company of the Miners' Bank of Dubuque, without any lawful authority; and calling upon them to show by what warrant they claim the right to use the liberties and franchises aforesaid.

The plaintiffs in error appeared, and pleaded that the privileges and franchises which they were exercising were conferred on them by a charter of incorporation, duly passed by the proper authority, which is more particularly set forth in the plea, but need not be here stated.

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<sup>1</sup> See *Territory v. Lockwood*, 3 Wall., 239.

Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out, was not such a final judgment as allowed an appeal to the Supreme Court. *Holcombe v. McKusick*, 20 How., 552.

Reversing the judgment, and awarding a new trial, is not a final judgment. *Tracy v. Holcombe*, 24 How., 426.

Motions to quash executions, when ruled upon, are not final judgments. *Boyle v. Zacharie*, 6 Pet., 648; *Smith v. Trabue*, 9 Id., 4; nor is a decision upon a rule or motion. *Toland v. Sprague*, 12 Pet., 300; *Evans v. Gee*, 14 Id., 1.

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To this plea, the defendant in error replied, that the act of incorporation conferring the privileges in question was repealed by the legislature of Iowa; and the plaintiffs in error rejoined, averring that the repealing law was passed without any notice to them, or any opportunity afforded them of being heard in their defence, and without any evidence of the abuse and misuse of any of the liberties and franchises in question. To this rejoinder the defendant in error demurred, and the plaintiffs joined in demurrer, and at the trial of the case, the following judgment was given by the court:—

“It appears to the court that the said rejoinder, and the matters therein contained, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their aforesaid information thereof against the said defendants, and that said demurrer ought to be sustained.

“Therefore it is ordered by the court here, that the said defendants take nothing by their said rejoinder, and that they have leave to amend or answer over to the said plaintiffs’ replication, by Monday morning next, at the meeting of the court.”

No amendment, however, appears to have been made, nor any further proceeding to have been had in the District Court; but upon the judgment above stated the case was removed to the Supreme Court of the Territory, where the judgment of the District Court was affirmed, and a *procedendo* awarded.

It is evident that this judgment is not a final one against the plaintiffs in error. It merely decides, that the rejoinder and the matters therein contained are not sufficient to bar the information, and that the demurrer ought to be sustained, and that the plaintiffs in error take nothing by their rejoinder. But there is no judgment of ouster against them, nor any thing in the judgment which prevents them from continuing to exercise the liberties and privileges which the information charges them to have usurped. In order to make the decision a final one, the court, under the opinion expressed by them, should have proceeded to adjudge that the plaintiffs in error do not in any manner use the privileges and franchises in question, and that they be forever absolutely forejudged and excluded from exercising or using the same, or any of them, in future. And we presume that the Supreme Court of the Territory awarded the *procedendo* to the District Court in order to enable it to \*proceed to final judgment, the Supreme  
\*215] Court having no power to give a judgment of ouster, in the shape in which the case came before it.

Inasmuch, therefore, as there has been no final judgment,

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the writ of error from this Court must be dismissed for want of jurisdiction. And being dismissed on this ground, it is unnecessary to examine the other objections which have been taken in support of the motion.

## ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel. On consideration whereof, and it appearing to the court here upon an inspection of said transcript that the judgment of the said Supreme Court is not a final one in the case, it is thereupon now here ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

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 WHARTON JONES, PLAINTIFF, v. JOHN VAN ZANDT.\*

Under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harboring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.<sup>1</sup>

Such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent to the person who harbors or conceals the fugitive; and to charge him under the statute a general notice to the public in a newspaper is not necessary.<sup>2</sup>

Clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

Receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harboring or concealing of the fugitive within the statute.

A transportation under the above circumstances, though the boy should be recaptured by his master, is a harboring or concealing of him within the statute.

Such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harboring him within the statute.

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\*Same case, 2 McLean, 596, 611.

<sup>1</sup> See *Robinson v. Rowland*, 28 Hun. (N. Y.), 502.

<sup>2</sup> Notice, as used in this statute, means knowledge. "It is enough if

the defendant knows that the person he is harboring is a fugitive from labor." *Oliver v. Weakley*, 2 Wall, Jr., 311, 317.

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A claim of the fugitive from the person harboring or concealing him need not precede or accompany the notice.

Any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harboring of the fugitive within the statute.

In this particular case, the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

\*216] \*They also contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

The averments in the said counts, that the defendant harboured said Andrew, are sufficient.

Said counts are otherwise sufficient.

The act of Congress, approved February 12, 1793, is not repugnant to the constitution of the United States.

The said act is not repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An Ordinance for the Government of the Territory of the United States northwest of the River Ohio."

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

It was an action of debt, brought by Jones, a citizen of Kentucky, against Van Zandt, a citizen of Ohio, for a penalty of five hundred dollars, under the act of Congress passed on the 12th of February, 1793, for concealing and harbouring a fugitive slave belonging to the plaintiff. The act is found in 1 Statutes at Large, 302.

The 3d and 4th sections, which were the only ones involved in this case, are as follows:—

"§ 3. Be it enacted, that when a person held to labor in any of the United States, or in either of the Territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such arrest or seizure shall be made; and, upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive



from labor to the State or Territory from which he or she fled.

"§ 4. That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action of \*debt, in any [\*217 court proper to try the same; saving, moreover, to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them."

The suit was brought in the Circuit Court of Ohio, in June, 1842. The declaration consisted of four counts, the two last of which were abandoned in the progress of the cause. As the remaining two—viz. the first and the second—are commented upon by the court, it is deemed proper to insert them. They are as follows:—

*"First Count.—Concealing.*

"Wharton Jones, a citizen of, and resident in Kentucky, by Charles Fox, his attorney, complains of John Van Zandt, a citizen of, and resident in Ohio, was summoned to answer unto the plaintiff in a plea of debt; for that, whereas, a certain person, to wit, Andrew, aged about thirty years, Letta, aged about thirty years, on the 23d day of May, in the year eighteen hundred and forty-two, at Boone county, in the State of Kentucky, was the slave of, and in possession of the plaintiff, and his property, and owed service and was held to labor to the plaintiff by the laws of Kentucky, unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, departed and went away from, and out of the service of the plaintiff, at said Boone county, and came to the defendant at Hamilton county, in the State and district of Ohio, and was there a fugitive from labor; and the defendant, well knowing that said Andrew was the slave of the plaintiff, and a fugitive from labor, yet afterwards, to wit, on the day and year aforesaid, at said district, contriving, and unlawfully and unjustly intending to injure the plaintiff, and to deprive him of said slave, and of his service, and of the profits, benefits, and advantages that might and would otherwise have arisen and

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accrued to him from said slave and his service, did then and there, *and there* knowingly and willingly, wrongfully, unjustly, and unlawfully receive the said slave of the plaintiff into his service, and knowingly and willingly harbour, detain, conceal, and keep the said slave, in consequence of which the plaintiff lost said slave, and was deprived of his services and of all benefits, profits, and advantages which might and would have arisen and accrued to him from such slave and his service, contrary to the statute of the United States in such case made and provided, whereby the defendant forfeited the sum of five hundred dollars to and for the use of the plaintiff; yet the defendant, though often requested, has not paid the same, nor any part thereof."

*"Second.—Concealing.*

"And also for that, whereas, on the day and year aforesaid, at said Boone county, a certain person, to wit, Andrew, aged about thirty years, was the slave of, and in the possession of \*218] the plaintiff, \*and his property, and owed service, and was held to labor to the plaintiff by the laws of the State of Kentucky, did unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, depart and go away from and out of his service, to wit, at Boone county aforesaid, and came to Hamilton county in the State and district of Ohio, to the defendant; and the defendant had notice that the said Andrew was the slave of the plaintiff, and a fugitive from labor; yet afterwards, to wit, on the day and year aforesaid, at the district aforesaid, contriving, and wrongfully and unjustly intending to injure the plaintiff, and deprive him of the said slave, and of his service, then and there, on the day and year aforesaid, at the district aforesaid, knowingly and willingly, unjustly, wrongfully, and unlawfully conceal the said slave from the plaintiff, in consequence of which the plaintiff lost said slave, and was deprived of his service, and of all profits, benefits, and advantages which might and otherwise would have arisen and accrued to the plaintiff from such slave and his service, contrary to the statute of the United States in such cases made and provided, whereby the defendant forfeited the sum of five hundred dollars, to and for the use of the plaintiff. Yet, though often requested, he has not paid the same, nor any part thereof."

The defendant pleaded the general issue, and in July, 1843, the cause came on for trial. The jury found a verdict for the plaintiff. The substance of the evidence given upon the

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trial was agreed upon by the counsel who argued the cause in this court, as will be seen by the following, viz. :—

“The undersigned, of counsel respectively for Jones and Van Zandt, now under submission to the court, agree that the statement of the evidence as contained in the opinion of his Honor, the circuit judge, on the trial below, shall be taken and considered by the court in the same manner as if it were a part of the record, and certified by the Circuit Court.

J. H. MOREHEAD,

“26th February, 1847.

*Of counsel for Jones.*

WILLIAM H. SEWARD,

*Of counsel for defendant Van Zandt.”*

The evidence thus adopted by agreement was stated by Mr. Justice McLean, in the trial below, as follows. See 2 McLean's Reports, 597.

“Jones, a witness called by the plaintiff, stated that the plaintiff owned nine negroes (naming them), and resided in Boone county, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 23d of April, 1842, about nine o'clock, he was at the house of the plaintiff, and saw the negroes; the next day, at about 12 o'clock, he saw the \*same ne- [\*219 groes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed.

“The plaintiff paid a reward to the persons who returned the negroes, of four hundred and fifty dollars, and other expenses which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum.

“Several other witnesses corroborated the statements of this witness, as to the ownership of the negroes, the reward paid, and the value of the services of Andrew.

“Hefferman, a witness, stated, that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday morning, a little after daylight, he saw a wagon which was rapidly passing through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness, and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates's, about

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six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he checked the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse, which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who, seizing the reins of the horses, drew them up into a corner of a fence. The driver jumped off and ran some distance; Van Zandt, the defendant, then came out of the wagon, and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them, called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington, and lodged in jail.

"Hargrave,—accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice which directed the colored boy to drive over the witness. That the wagon tongue being driven against the horse of the witness, he was thrown, and the wagon horses were driven on the run, until overtaken and stopped. Seeing the defendant in the wagon, with the negroes, the witness asked him if he did not know they were slaves. The defendant replied, that he knew they were slaves, but that they were born free. He said he was going to Springboro', a village in Warren county. This witness, and also Hefferman, stated the amount paid as a reward, for bringing the negroes to Covington, as above.

\*220] "Hume,—very early on Sunday morning saw the wagon moving very rapidly, and two men on horse-back pursuing it, near Bates's. Looked into the wagon, after it was stopped, and saw the defendant in it, with the negroes. He was asked if he did not know that they were slaves, and he replied, that by nature they were as free as any one. Witness took the negroes to Covington in a wagon. Some time after this, he saw the defendant, who said to him, 'If you had let me alone, the negroes would have been free, but now they are in bondage.' And the defendant said it was a Christian act to take slaves and set them at liberty.

"Bates, a witness, states that he went to the wagon after it had been stopped, looked into it, and saw the defendant with the negroes. The witness said, 'Van Zandt, is that you? have you a load of runaways?' The defendant replied, 'They are, by nature, as free as you and I.' The witness heard the defendant say that, having been at market in the city of Cin-

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cinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. He afterwards said that he had received the blacks from Mr. Alley.

"McDonald, a witness, stated that he heard the defendant say he received the negroes on Walnut Hills, the same place as Lane Seminary. That, at three o'clock on Sunday morning, he found the negroes standing near his wagon, in the road; they got into it, and he started for home. That he rose early to have the cool of the morning. Defendant said he had done right. That he would at all times help his fellow-man out of bondage; and that what he had done he would do again.

"Thurman, a witness, stated that he saw the defendant in the wagon with the negroes, the cover closed behind and before. The defendant said to Hefferman, the negroes ought to be free, but he knew they were not. The defendant lives at Sharon, and this was six or seven miles beyond, on the road to Lebanon."

After the rendition of the verdict in the court below, the counsel for the defendant filed reasons in support of a motion for a new trial, and also reasons in support of a motion for arrest of judgment, which were, respectively, as follows, viz. :—

JOHN VAN ZANDT ads. WHARTON JONES.

*Circuit Court of United States, 7th Circuit and District of Ohio.—In Debt.—Verdict \$500.*

The defendant, John Van Zandt, by his counsel, moves the court for a new trial, and assigns the following reasons :—

\*1. The court erred in charging the jury that it was not necessary to prove that the defendant intention- [\*221 ally placed the colored persons in question out of view, for the purpose of eluding the search of the master or his agent, in order to establish the fact of concealment, or to prove that he received, sheltered, and placed them out of view for said purpose, in order to establish the fact of harbouring; but charged that it was sufficient, if the jury believed, from the evidence, that the defendant received the colored persons into his wagon, and transported them to Bates's from Walnut Hills, with intent to facilitate their escape from their master.

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2. The court erred in charging the jury that it was not necessary, in order to establish the plaintiff's right to recover, to prove actual notice to the defendant from the claimant, or some one acting in his behalf, that the persons alleged to be harboured or concealed by him were fugitives from labor, within the meaning of the act of Congress; but charged, that it was sufficient if the jury should be satisfied, from the evidence, that the defendant knew that such persons were fugitives from labor.

3. The verdict is against evidence.

4. The verdict is against law.

CHASE & BALL, *Attorneys for Def't.*

JOHN VAN ZANDT ads. WHARTON JONES.

*Circuit Court of United States, 7th Circuit and District of Ohio.—In Debt.*

The defendant, by his counsel, moves the court to arrest judgment on the verdict rendered in this cause for the following reasons:—

I. Because the plaintiff's declaration, and the allegations therein contained, are insufficient in law to warrant said judgment.

1. In this, that in no count of said declaration has the plaintiff averred that the person or persons therein described as fugitives from labor were held to service under the laws of the State of Kentucky, and, being so held, escaped from that State into the State of Ohio.

2. In this, that the act of Congress referred to in said declaration is unwarranted by, or repugnant to, the constitution of the United States, and therefore null and void.

3. That the said act, so far as it applies to the case made in the plaintiff's declaration, is repugnant to the sixth article of the ordinance for the government of the territory of the United States northwest of the river Ohio, and therefore, so far, null and void.

4. In other respects.

II. Because the verdict rendered by the jury is general, whereas it ought to have been confined to the good count, or counts, in said declaration.

CHASE & BALL, *Attorneys for Def't.*

\*222] \*In order to bring these questions before the Supreme Court, the judges below differed *pro forma*, and a certificate was made out, showing that their opinions were opposed on the following points:—

First. Whether, under the 4th section of the act of 12th February, 1793, "respecting fugitives from justice, and persons escaping from the service of their masters, on a charge for harbouring and concealing a fugitive from labor," the notice must be in writing by the claimant, or his agent, stating that such person is a fugitive from labor, under the 3d section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

Secondly. Whether such notice, if not in writing and served as aforesaid, must be given verbally by the claimant or his agent to the person who harbours or conceals the fugitive; or whether, to charge him under the statute, a general notice to the public in a newspaper is necessary.

Thirdly. Whether clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is not sufficient to charge him with notice.

Fourthly. Whether receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is not a harbouring or concealing of the fugitive within the statute.

Fifthly. Whether a transportation, under the above circumstances, though the boy should be recaptured by his master, is not a harbouring or concealing of him within the statute.

Sixthly. Whether such a transportation, in an open wagon, whereby the services of the boy were entirely lost to his master is not a harbouring of him within the statute.

Seventhly. Whether a claim of the fugitive from the person harbouring or concealing him must precede or accompany the notice.

Eighthly. Whether any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute.

The cause having progressed, and the jury brought in their verdict, the defendant moved in arrest of judgment, and assigned sundry reasons in support of his motion, on some of

which points the opinions of the judges were opposed, to wit:—

First. Whether the first and second counts contain the \*223] necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

Secondly. Whether said counts contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

Thirdly. Whether the averments in said counts, that the defendant harboured said Andrew, are sufficient.

Fourthly. Whether said counts are otherwise sufficient.

Fifthly. Whether the act of Congress, approved February 12th, 1793, be repugnant to the constitution of the United States.

Sixthly. Whether said act be repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."

The case was submitted on printed argument, by *Mr. Morehead*, for the plaintiff, and *Mr. Chase* and *Mr. Seward*, for the defendant. It is impossible to insert the whole of these arguments, as that of *Mr. Chase* is upwards of one hundred pages, and that of *Mr. Seward* forty pages, in length.

The points stated and argued by *Mr. Chase* were the following:—

1. Whether the plaintiff's declaration be sufficient; and, under this head, what are the requisites of notice under the act of 1793?

2. What acts constitute the offence of harbouring or concealing, under the statute?

3. Whether the act of 1793 be consistent with the provisions of the ordinance of July 13, 1787?

4. Whether the act of 1793 be not repugnant to the constitution of the United States?

*Mr. Seward* stated his point as follows:—

1. The declaration is insufficient.

2. The evidence was improper and insufficient.

3. The act of 1793, so far as the present subject is involved, is void, because it violates the ordinance of 1787.

4. The act of 1793 conflicts with the constitution of the United States, and is therefore void.



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Mr. Justice WOODBURY delivered the opinion of the court.

This case comes here on a division of opinion in the Circuit Court of Ohio.

The subject matter of the original suit was debt for a penalty of \$500, under the act of Congress of February 12th, 1793, for concealing and harbouring a fugitive slave belonging to the plaintiff.

The certificate of the division of opinion, as will be seen in the record, relates to various questions, arising under two heads.

\*First, on rulings made at the trial, and, secondly, [\*224 on a motion in arrest of judgment.

These questions extend to the unusual number of fourteen. Not, however, that the presiding judge in the circuit and his associate entertained strong doubts concerning the general principles involved in them all, as may be seen in the report of the case (2 McLean, 615), but because the questions involved could not otherwise be brought here; and they possessed so wide and deep an interest, as to render it desirable they should come under the revision of this court.

For that purpose, in conformity to what is understood to have been the usage in the circuits, they accommodated the parties by letting a division *pro forma* be entered on all the points presented.<sup>1</sup>

It is not understood that any of them embrace things urged merely as reasons for a new trial. For if they did,—as such a trial rests in the discretion of the court, and is not a matter of strict right,—a division of opinion in relation to it furnishes no cause for bringing the case here for our decision on questions certified. *United States v. Daniell*, 6 Wheat., 542; 4 Id., 213; 5 Cranch, 11, 187; 4 Wash. C. C., 333.

Before entering on the examination of the points, it will make several of them more intelligible, if we advert to the clause in the constitution bearing on this subject, and the act of Congress under which the action was instituted.

The former is, that “No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.”—Art. IV., § 2.

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<sup>1</sup> See *United States v. Chicago*, 7 How., 192.

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In respect to the statute, it will not be necessary to repeat here any of it, except portions of the 3d and 4th sections;—

§ 3. "And be it also enacted, That when a person, held to labor in any of the United States or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor."

§ 4. "And be it further enacted, that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars."—1 Stat. at L., 303, 305, Act of Feb. 12, 1793.

\*225] "The first question at the trial on which a division arose was, in substance, whether the "notice" referred to in the 4th section must be in writing.

No doubt exists with this court that it may be otherwise than in writing, if it only bring home clearly to the defendant knowledge that the person he concealed was "a fugitive from labor."

The offence consists in continuing to secrete from the owner what the acts of Congress and the constitution, as well as the laws of several of the States, treat for certain purposes, as property, after knowing that claims of property exist in respect to the fugitive.

Now the act of Congress does not, in terms, require the notice to be in writing, nor does the reason of the provision, nor the evil to be guarded against, nor any sound analogy.

The reason of the provision is merely, that the party shall have notice or information sufficient to put him on inquiry, whether he is not intermeddling with what belongs to another.

If the information given to him, orally or in writing, is such as ought to satisfy a fair-minded man that he is concealing the property of another, it is his duty under the constitution and laws to cease to do it longer. *Eades v. Vandeput*, 5 East, 39, note; *Blake v. Lanyon*, 6 T. R., 221.

Such a notice is sufficient also by way of analogy; as, for instance, notice in relation to a prior claim on property purchased. *The Ploughboy*, 1 Gall., 41; 9 Ju., 649; 1 Sumn.,

173; 1 Cranch, 45. Or of a prior defence or set-off against a demand assigned to him. *Humphries v. Blight's Assignees*, 4 Dall., 370. Or even in crimes, that the notes or coin one is passing away are counterfeit.

Any other construction would go, likewise, beyond the evil to be avoided by the notice, which was the punishment of an individual for harbouring or concealing a person, without having reasonable grounds to believe he was thereby injuring another.

Any other construction, too, would be suicidal to the law itself, as before a notice in writing could be prepared and served on the defendant, the fugitives would be carried beyond the reach of recovery in many cases, and in others would have passed into unknown hands.

This is not a case like some cited in the argument, where the party prosecuted was not concerned in getting away the apprentice or person harboured, but merely entertained him afterwards from hospitality, or in ignorance of his true character and condition.

Then a more formal notice and demand of restoration may be proper, before suit, in order to remove any doubts as to the condition of the fugitive who is thus entertained, or the intent of the master to enforce his rights and reclaim his property. 1 Chit. Gen. Pr., 449. But verbal notice is enough then. See the cases in East and T. R., just cited.

\*Besides this, the present is a case where the defendant was a partaker in accomplishing the escape [\*226 itself, like a *particeps criminis*, and where the concealment and harbouring were not after the escape was over, but during its progress, while the slaves were *in transitu*; and where the notice is not exclusively with a view to procure their restoration, but is also an element in the case to show whether the party was, knowingly or ignorantly as to their condition, rendering them assistance to escape by temporarily harbouring or secreting them. So far as regards this point, it is a question merely of *scienter*. No matter how or whence the knowledge came, if it only existed. The concealment here was practised during fresh pursuit to retake the slaves; and hence, without any formal notice or demand, no doubt could exist as to the wish to reclaim them, as well as the fact of their being slaves. See *Hart v. Aldridge*, Cowp., 54.

Furthermore, that the defendant has not suffered by the charge to the jury on this point is manifest from his own declarations at the time, that he knew the fugitives to be slaves (*Jones v. Van Zandt*, 2 McLean, 559), and from the

instruction to the jury that this fact must be clearly proved before they ought to convict him (p. 607).

This view of the subject disposes of several other points of division connected with it. Because every purpose contemplated by the notice is accomplished, without a publication of it previously in a newspaper, which is the second question.

To require such a publication would be entirely arbitrary, and would still more surely defeat the whole law than to hold the notice must be in writing, and served on the defendant, before he is liable.

So, as to the third question, whether the information be sufficient if acquired from the slave himself,—it is manifest that such a source of information for that fact is one of the most satisfactory, as he has good means of knowing it, and is not likely to admit his want of freedom, unless it actually exist.

The next question relates to what constitutes concealment or harbouring of a slave, within the meaning of this statute.

It seems from the facts, which by agreement are all those reported in the printed case as tried in the court below (2 McLean, 596), as well as those inserted in this record, that several slaves, owned by the plaintiff in Kentucky, escaped from him and fled to Ohio, adjoining, and, aided by some person not named, and when about twelve miles distant from their master's residence, were taken into a covered wagon by the defendant in the night, and driven with speed twelve or fourteen miles, so that one was never retaken, though fresh suit was made for the whole.

Now, whatever technical definition may exist of the word *conceal* or *harbour*, as applied to apprentices or other subjects, no \*doubt can exist, that these words and their \*227] derivatives must here be construed in reference to the matter of the statute, and the nature of the offence to be punished.

These show this offence to consist often in assistance to escape, and reach speedily some distant place, where the master cannot find or reclaim such fugitives, rather than in detaining them long in the neighbourhood, or secreting them about one's premises.

We see nothing, then, in the facts here, or in the instruction of the judge on them, *secundum subjectam materiam*, which shows this case not to have been, as the jury found it to be, one within the manifest design of the statute against harbouring and concealing persons who were fugitives from labor, after notice, or full knowledge of their character.

Indeed, the general definition of the word *harbour* in 1

Bouvier, 460, as quoted by the defendant's counsel,—saying nothing as to the authority of that work,—is such as to be fully covered by the facts in this case, as stated in the record, and as found by the jury. It is,—“to receive clandestinely, and without lawful authority, a person for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same.”

There was a clandestine reception of the slaves, and without lawful authority, and a concealment of them in a covered wagon, and carrying them onward and away, so as to deprive the owner of their custody. “To harbour” is also admitted in the argument often to mean “to secrete.” Such is one of the established definitions by the best lexicographers. Yet here they were secreted, not only, as just stated, by being placed in a covered wagon, and carried to a greater distance from their master, but it was done rapidly, and in part under the shades of night.

That no mistake on this point occurred at the trial is likewise manifest from the fact, that the judge charged the jury, the defendant must not be considered as harbouring or concealing the slaves, unless his conduct was such, “as not only to show an intention to elude the vigilance of the master, but such as is calculated to attain that object.” 2 McLean, 615.

Nor can the recovery of one of the slaves afterwards, who was thus concealed and transported, vary the previous fact of secreting and harbouring him. That is the fifth inquiry. The answer to the sixth is involved in that to the fourth and fifth; as is an answer to the seventh in that to the first question. Because, if the notice need not come from the claimant himself, nor be in writing, it need not be preceded or accompanied by a claim, which is the seventh inquiry. A claim subsequently made must be equally valid with one before the notice, whether looking to the reason of the case, or the language of the statute.

The gist of the offence consists in the concealment of another's \*property, under knowledge that it belongs [\*228 to another, and not in a claim being previously made and refused. That refusal might constitute a separate wrong, or be another species of evidence to prove a harbouring of the slave, but it is not the offence itself, for which the penalty now sued for is imposed.

The eighth and last question under this head seems to be an abstract proposition, and does not refer to any particular facts in the case. But if it was laid down in relation to some of them, as it must be presumed to have been in order to make it a proper subject for a division of opinion, to be

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reconsidered here, we are not aware of any thing objectionable in it. The "overt act" spoken of was required to be one both intended and calculated to elude the master's vigilance. If so, it showed acts and designs of the defendant, which in the words and spirit of the statute amount or tend directly to "*harbour or conceal*" the fugitive from labor.

We shall now proceed to the points of division in respect to the motion in arrest. They are, firstly, whether the counts contain the necessary averments, that the slave Andrew escaped from Kentucky to Ohio.

It is admitted that, this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit. Dwarr. Stat., 736; 5 Dane, Abr., 244, § 8; *Simmon's case*, 4 Wash. C. C., 397. It is not necessary to multiply authorities on so elementary a proposition.

On turning to the counts, however, it will be seen that they allege the residence of the plaintiff in Kentucky,—the ownership by him of these slaves, held to labor there,—and their "unlawfully," and "without his consent," going from that place to Ohio, as "fugitives from labor." All these allegations combined, and not merely the *going away*, are a clear and sufficient averment of an escape of the slave Andrew under the first objection in arrest. If they contain sufficient matter to show an escape, it need not be alleged in the very words, *ipsisimis verbis*, of the statute. 1 Chit. Pl., 357; *The King v. Stevens et al.*, 5 East, 244.

The ungrammatical use of the word "was" for "were," in speaking of both slaves, is urged as an uncertainty which vitiates this part of the declaration. But no one can doubt that both are referred to, and the more especially after a verdict. As to what is thus covered by a verdict, see *Garland v. Davies*, 4 How., 131, and the cases there cited, and 11 Wend. (N. Y.), 374.

The second point certified under the motion in arrest is, whether the "counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress."

We cannot doubt that they do, when the first count alleges that said Andrew was in Ohio, "a fugitive from labor, and the defendant, well *knowing* that said Andrew was the slave of the plaintiff, and a fugitive from labor," &c., did harbour and conceal him.

\*229] \*So in respect to the third question connected with the arrest of judgment, which is, whether the averments are sufficient under the statute as to harbouring the

slave Andrew, the answer can be but one way. However strict the construction should be, yet the count alleges, in so many words, that the defendant did "knowingly and willfully harbour, detain, conceal, and keep said slave."

Under the fourth general objection of insufficiency in the declaration, no specific point, not otherwise designated, has been called to our attention, except that all the acts alleged in the declaration are not said to be "contrary to the statute." This last expression follows the concluding portion of the count, and this expression may be necessary in a penal declaration. *Lee v. Clark*, 2 East, 332; 1 Gall., 259, 265, 271; 1 Chit. Pl., 358.

But all know, that where it is inserted at the end of a declaration or indictment, it does not, as a general rule, relate to the last preceding averments alone, but the whole subject-matter before alleged to constitute an offence. It is all that misconduct which is contrary to the statute, and not the concluding part of it only.

It remains to consider the fifth and sixth divisions of opinion under this head. They are, whether the act of Congress, under which the action is brought, is repugnant either to the constitution, or the ordinance "for the government of the territory northwest of the river Ohio."

This court has already, after much deliberation, decided that the act of February 12th, 1793, was not repugnant to the constitution. The reasons for their opinion are fully explained by Justice Story in *Prigg v. Pennsylvania*, 16 Pet., 611.

In coming to that conclusion they were fortified by the idea, that the constitution itself, in the clause before cited, flung its shield, for security, over such property as is in controversy in the present case, and the right to pursue and reclaim it within the limits of another State.

This was only carrying out, in our confederate form of government, the clear right of every man at common law to make fresh suit and recapture of his own property within the realm. 3 Bl. Com., 4.

But the power by national law to pursue and regain most kinds of property, in the limits of a foreign government, is rather an act of comity than strict right; and hence, as the property in persons might not thus be recognized in some of the States in the Union, and its reclamation not be allowed through either courtesy or right, this clause was undoubtedly introduced into the constitution, as one of its compromises, for the safety of that portion of the Union which did permit such property, and which otherwise might often be deprived

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of it entirely by its merely crossing the line of an adjoining State. 3 Madison Papers, 1569, 1589.

This was thought to be too harsh a doctrine in respect to \*230] any \*title to property,—of a friendly neighbour, not brought nor placed in another State, under its laws, by the owner himself, but escaping there against his consent, and often forthwith pursued in order to be reclaimed.

The act of Congress, passed only four years after the constitution was adopted, was therefore designed merely to render effective the guaranty of the constitution itself; and a course of decisions since, in the courts of the States and general government, has for half a century exhibited great uniformity in favor of the validity as well as expediency of the act. 5 Serg. & R. (La.), 62; 9 Johns. (N. Y.), 67; 12 Wend. (N. Y.), 311, 507; 2 Pick. (Mass.), 11; Baldw., 326; 4 Wash. C. C., 326; 18 Pick., 215.

While the compromises of the constitution exist, it is impossible to do justice to their requirements, or fulfil the duty incumbent on us towards all the members of the Union, under its provisions, without sustaining such enactments as those of the statute of 1793.

We do not now propose to review at length the reasoning on which this act has been pronounced constitutional. All of its provisions have been found necessary to protect private rights, under the cause in the constitution relating to this subject, and to execute the duties imposed on the general government to aid by legislation in enforcing every constitutional provision, whether in favor of itself or others. This grows out of the position and nature of such a government, and is as imperative on it in cases not enumerated specially, in respect to such legislation, as in others.

That this act of Congress, then, is not repugnant to the constitution, must be considered as among the settled adjudications of this court.

The last question on which a division is certified relates to the ordinance of 1787, and the supposed repugnancy to it of the act of Congress of 1793.

The ordinance prohibited the existence of slavery in the territory northwest of the river Ohio among only its own people. Similar prohibitions have from time to time been introduced into many of the old States. But this circumstance does not affect the domestic institution of slavery, as other States may choose to allow it among their people, nor impair their rights of property under it, when their slaves happen to escape to other States. These other States, whether northwest of the river Ohio, or on the eastern side of the



Alleghanies, if out of the Union, would not be bound to surrender fugitives, even for crimes, it being, as before remarked, an act of comity, or imperfect obligation. *Holmes v. Jennison et al.*, 14 Pet., 540. But while within the Union, and under the obligations of the constitution and laws of the Union, requiring that this kind of property in citizens of other States—the right to “service or labor”—be not discharged or destroy it, they must not interfere to impair or destroy it, but, if one so held to labor escape into \*their limits, [\*231 should allow him to be retaken and returned to the place where he belongs. In all this there is no repugnance to the ordinance. Wherever that existed, States still maintain their own laws, as well as the ordinance, by not allowing slavery to exist among their own citizens (4 Mart. (La.), 385). But in relation to inhabitants of other States, if they escape into the limits of States within the ordinance, and if the constitution allow them, when fugitives from labor, to be reclaimed, this does not interfere with their own laws as to their own people, nor do acts of Congress interfere with them, which are rightfully passed to carry these constitutional rights into effect there, as fully as in other portions of the Union.

Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of Congress in respect to this subject, on account of the supposed expediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule.

Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a strait and narrow one, to go where that constitution and the laws lead, and not to break both, by travelling without or beyond them.

Let our opinion on the several points raised be certified to the Circuit Court of Ohio in conformity to these views.

ORDER.

This cause came on to be heard on the transcript of the

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record from the Circuit Court of the United States for the District of Ohio, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court,—

1st. That, under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harbouring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor, under the third section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

\*232] \*2d. That such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent, to the person who harbours or conceals the fugitive, and that to charge him under the statute, a general notice to the public in a newspaper is not necessary.

3d. That clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

4th. That receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio, about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harbouring or concealing of the fugitive within the statute.

5th. That a transportation under the above circumstances, though the boy should be recaptured by his master, is a harbouring or concealing of him within the statute.

6th. That such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harbouring of him within the statute.

7th. That a claim of the fugitive from the person harbouring or concealing him need not precede or accompany the notice.

8th. That any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his

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agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute.

9th. That the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

10th. That said counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress.

11th. That the averments in said counts, that the defendant harboured said Andrew, are sufficient.

12th. That said counts are otherwise sufficient.

13th. That the act of Congress approved February 12th, 1793, is not repugnant to the constitution of the United States. And,

Lastly. That the said act is not repugnant to the ordinance of Congress adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court of the United States for the District of Ohio.

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**\*WILLIAM TAYLOR, GEORGE TAYLOR, WILLIAM PRIM-ROSE, AND ELIZA, HIS WIFE, GEORGE PORTER, AND [ \*283 ELSPET, HIS WIFE, WILLIAM RAINEY, ALEXANDER RAINEY, AND ELIZABETH RAINEY, COMPLAINANTS AND APPELLANTS, v. VINCENT M. BENHAM, ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED, OF SAMUEL SAVAGE, DECEASED, RESPONDENT AND APPELLEE.**

**VINCENT M. BENHAM, &C., v. GEORGE TAYLOR, &C.**

By the laws of Alabama, an administrator *de bonis non*, with the will annexed, is liable for assets in the hands of a former executor.<sup>1</sup>

Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident

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<sup>1</sup> See *Chew v. Hyman*, 10 Biss., 250; *Wilkinson v. Hunter*, 37 Ala., 268; but the general rule is, that the succeeding executor or administrator is not liable for moneys collected by the former administrator or executor, or the value of chattels to the use of which a legatee is entitled for life by the will. *In Re Place*, 1 Redf. (N. Y.), 276; *Brownlee v. Lockwood*, 5 C. E. Gr. (N. J.), 239; *Anderson v. Miller*, 6 J. J. Marsh. (Ky.), 568; *Smithers v. Hooper*, 23 Md., 273; *Ruff v. Smith*, 31 Miss., 59; nor any *devastavit* or default of his predecessors. *Alsop v. Mather*, 8 Conn., 584.

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or mistake, to make it just to reopen and revise the account after the lapse of twenty years and the death of the parties concerned.<sup>2</sup>

Where a person who held land as trustee directed by his will that the whole of the property that he may die seized and possessed of, or may be in any wise belonging to him, should be sold, the executors had power to sell the land held in trust, as well as that belonging to the testator in his own right.<sup>3</sup>

The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original *cestui que trust*.<sup>4</sup>

<sup>2</sup> In a case where no fraud or misconduct was alleged, it was held that a final account would not be opened after a lapse of twenty years. *Child's Appeal*, 23 N. H., 225; but where the settlement of account was affected with fraud, it was held that the Probate Court would open it, though final, and of twenty years' standing. *Davis v. Cowdin*, 20 Pick. (Mass.), 510; yet not in a court of equity. *Sever v. Russell*, 4 Cush. (Mass.), 513; *Jennison v. Hapgood*, 7 Pick. (Mass.), 1, 7; see also *Decker v. Elmwood*, 1 Thomp. & C. (N. Y.), 48; *Mix's Appeal*, 35 Conn., 121. *Sherman v. Chase*, 9 R. I., 166; *Stetson v. Bass*, 9 Pick. (Mass.), 27; *Campbell v. Bruen*, 1 Bradf. (N. Y.), 224. In a case where, from the lapse of time, the death of all the parties cognizant of the transaction, the destruction of the records of the county, and loss of papers had occurred, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and therefore refused. *Stamper v. Garnett*, 31 Gratt. (Va.), 550. In *Gregory v. Gregory, Coop.*, 201, the court refused to set aside a purchase by a trustee, after a lapse of eighteen years. So in *Baker v. Reed*, 18 Beav., 398, a bill filed after the lapse of seventeen years to set aside the purchase of a testator's estate by his executor at an undervalue, was dismissed on the ground of delay. *Carr v. Chapman*, 5 Leigh (Va.), p. 164. After a lapse of twenty years, it was held that the presumption was that the administrators had duly settled, and the burden of proof to the contrary was upon the complainant. *Estate of Bentley*, 9 Phil. (Pa.), 344.

<sup>3</sup> "It is now settled, after some fluctuations of opinion, that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary

intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected." Hill on Trustees, 283. This principle is abundantly substantiated by the cases. *Lord Braybroke v. Inskip*, 8 Ves., 417; *Co. Litt.*, 205, a., s. 1 (6th); *Lindsell v. Thacker*, 12 Sim., 178; *Doe d. Reude v. Reade*, 8 T. R., 118; *Hawkins v. Obeen*, 2 Ves., 559; *Ex parte Shaw*, 8 Sim., 159; *Sir Thomas Lytleton's case*, 2 Ventr., 351. This general rule is acted upon in the United States. *Heath v. Knapp*, 21 Pa. St., 228; *Jackson v. Delancy*, 13 Johns. (N. Y.), 537; *Deane v. Gunter*, 19 Ala., 731; *Richardson v. Woodbury*, 43 Me., 206; *Asay v. Hoones*, 5 Pa. St., 35; *Ballard v. Carter*, 5 Pick. (Mass.), 112; *Merritt v. Farmers' Ins. Co.*, 2 Edw. (N. Y.), 547; *Hughes v. Caldwell*, 11 Leigh (Va.), 342.

<sup>4</sup> Where a power of sale is created by will, and no one is named to exercise it, but the proceeds of the sale are directed to be applied or distributed by an executor, administrator, or other person, such executor, administrator, or other person, by implication, takes the power of selling, unless some other intention can be gathered from the will. *Newton v. Bennett*, 1 Bro. Ch., 135; *Forbes v. Peacock*, 11 Sim., 152; *Lippincott v. Lippincott*, 4 Green (N. J.) Ch., 121; *Jones's Appeal*, 5 Grant (Pa.), 19; *Curtis v. Fulbrook*, 8 Hare, 28. If the power is given in order to pay debts or legacies, by implication, the executor takes the power. *Bogert v. Hertell*, 4 Hill (N. Y.), 492; *Lockhart v. Northington*, 1 Sneed (Tenn.), 318; *Foster v. Craigie*, 2 Dev. & B. (N. C.) Eq., 209; *Putnam Free School v. Fisher*, 30 Me., 523; *Houck v. Houck*, 5 Pa. St., 273; *Devone v. Forning*, 2 Johns. (N. Y.) Ch., 254; *Gray v. Henderson*, 71 Pa. St., 368.

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The power in the executors to sell was a power coupled with a trust.

It might also be considered as a power coupled with an interest.

The distinction between these powers adverted to.

In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the *cestui que trust*.

Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise and not by descent, although they were supposed to be also *cestuis que trust*.

If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does.<sup>5</sup>

The testator, who held the land as trustee, having died in South Carolina, the executor took out letters testamentary in that State, sold the lands which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary.<sup>6</sup>

<sup>5</sup> An alien, possessed of real estate, died intestate, without any known heirs. It was held that the real estate vested in the State without office found; that a sale of such real estate to satisfy a debt against the alien, in a proceeding to which the State was not made a party, was void as to the State, but the purchaser was entitled to the rights of the creditor, and to have the real estate subjected to its payment. *Sands v. Lynham*, 27 Gratt. (Va.), 291; s. c., 21 Am. Rep., 348.

"The freehold must always vest somewhere, and it is on this account that the authorities uniformly hold that, whenever there is a defect of heirs, the title passes at once." *Crane v. Reeder*, 21 Mich., 24; s. c., 4 Am. Rep., 430. To the same effect are *Moors v. White*, 6 Johns. (N. Y.) Ch., 360; *Slater v. Nason*, 15 Pick. (Mass.), 345; *Fairfax v. Hunter*, 7 Cranch, 603; *Montgomery v. Dorian*, 1 N. H., 475; *Rubeck v. Gardner*, 7 Watts (Pa.), 455; *O'Hanlin v. Den*, Spenc. (N. J.), 31; s. c., 1 Zab., 582; *Hinkle v. Shadden*, 2 Swan (Tenn.), 46; *White v. White*, 2 Metc. (Ky.), 185; *Johnson v. Hart*, 3 Johns. (N. Y.) Cas., 322; *Fry v. Tucker*, 2 Dana (Ky.), 38; *Stevenson v. Dunlap*, 7 B. Mon. (Ky.), 134. Many of the cases cited hold that where there is a devise, office found must first be had before the State can claim the land. *Commonwealth v. Hite*, 6 Leigh (Va.), 588.

<sup>6</sup> A person, domiciled in England,

died there, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries. In a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended. The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction. The administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of those English letters, and could not be known as a representative in Pennsylvania. Two suits, therefore, one in England, between the executor and administrator of the claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties; and neither the decree nor the proceedings in the English suit are competent evidence in the American suit. Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England when a suit is pending in this country for American assets. A decree of the High Court of Chancery, in England, purporting to distribute assets so situated, is void for want of jurisdiction. *Aspden v. Nixon*, 4 How., 467. So if there is a complete

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Having sold the lands and received the consideration, he must be responsible to the residuary legatees.

An objection that only one executor sold (there having originally been four) cannot be sustained. Where a power is coupled with a trust, it is only necessary to show such a case as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust.

A power to sell, coupled either with an interest or trust, survives to the surviving executor. So also, if all the trustees or executors in such a case decline to act, except one.

When a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute.<sup>7</sup>

The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase money being received by him, he is responsible to the *cestui que trusts* for the money thus received. The reception of an additional sum, as purchase money, by them, with the reservation of the right to sue the executor, is not an avoidance of the first sale by the executor.

But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence or wilful default. A claim for damages would also be subject to the operation of the statute of limitations.<sup>8</sup>

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want of privity between the different administrators in different States, an action of debt will not lie in one State against an administrator, on a judgment recovered against a different administrator of the same intestate, appointed under the authority of another State. *Stacey v. Thrasher*, 6 How., 44. This subject is thoroughly discussed in *Hill v. Tucker*, 13 How., 458. The record of a debt against an administrator in one State, is not sufficient evidence of the debt against an administrator of the same estate in another State. *Hill v. Meek*, 18 How., 16. An administrator, appointed in the Cherokee Territory, was held entitled to receive payment of a debt in the District of Columbia, and to give a valid discharge. *Mackey v. Cox*, 18 How., 100; see 2 Kent, Com., pp. 434, 435 and note.

<sup>7</sup> In nearly all the States no will, until duly probated, can be used to prove the transfer of any interest, legal or equitable, in property of the testator. *Strong v. Perkins*, 3 N. H., 517; *Kittredge v. Fulsome*, 8 N. H., 98; and if the will affects the title of property in a State, other than the one in which it was originally proven, it must be recorded in such other State. *Wilson v. Tappan*, 6 Ohio, 172; *Bailey v. Bailey*, 8 Id., 239; *Campbell v. Wallace*, 4 Gray (Mass.), 162; *Campbell v. Sheldon*, 13 Pick. (Mass.), 8; *Iver v. Allyn*,

12 Vt., 589; see *Inchiquin v. French*, 1 Cox, 1; *Metham v. Devon*, 1 P. Wms., 529. And a court of equity has no jurisdiction over trusts created by the will of a foreigner, upon filing a certified copy of the will in the probate court of the jurisdiction where the remedy is sought. *Campbell v. Wallace*, 4 Gray (Mass.), 162.

<sup>8</sup> Trustees, in general, are liable for interest where they delay unreasonably to invest, or mingle the money with their own, or neglect to settle their accounts or pay over the money, or disobey directions of the will, or of a court, as to the time or manner of investing, or embark the funds in a trade or speculation without authority. *Knowlton v. Bradley*, 17 N. H., 458; *Lund v. Lund*, 41 N. H., 355; *Wood v. Garnett*, 6 Leigh (Va.), 271; *Graves' Appeal*, 50 Pa. St., 189; *Hess' Estate*, 60 Pa. St., 454; *Carr v. Laird*, 27 Miss., 544; *Armstrong v. Miller*, 6 Ohio, 118; *Williamson v. Williamson*, 6 Paige (N. Y.), 298; *Nelson v. Hagentown Bank*, 27 Md., 63. If they make usurious interest, they are liable for it. *Barney v. Saunders*, 16 How., 543; *Martin v. Rayborn*, 42 Ala., 468; *Oswald's Appeal*, 3 Grant (Pa.), 300. If the trustee cannot show the amount of interest he has received, he is chargeable with legal interest. *Bentley v. Shreve*, 2 Md. Ch., 219; *Rapalsky v. Hall*, 1 Sandf. Ch. (N. Y.), 339.

\*If the executor himself did not set up a claim, as an offset, for his personal expenses, his representative cannot do it, under the circumstances of this case. [\*234

The *cestui que trusts* residing in a foreign country, the statute of limitations did not begin to run until a demand was made upon the executor for the money. His retaining it during that time is no evidence that he did not intend to account for it.

Although the bill made no distinction between the two characters in which the executor acted, namely, as an executor proper, and as an executor having a power coupled with a trust, yet as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged upon which the claim rests.

THESE cases were twice before partially brought to the notice of the court, and are reported in 1 How., 282, and 2 Id., 395.

They were cross appeals from the district Court of the United States for the Northern District of Alabama, sitting as a court of equity.

The bill was originally filed by Samuel Taylor, the father of William, George, Eliza, and Elspet, together with his nephews, William Rainey, Alexander Rainey, and his niece, Elizabeth Rainey, against George M. Savage, executor of Samuel Savage, deceased. The object of the bill was to hold the estate of Samuel Savage responsible for certain moneys which, it was alleged, he had received during his lifetime, in his capacity of executor of William F. Taylor, a citizen of the State of South Carolina, and also for his alleged neglect of lands in Kentucky, by which they were lost.

The record was very voluminous, as a great mass of evidence was filed in the court below, all of which was brought up to this court.

The claim divided itself into two distinct branches, one arising from transactions in South Carolina, where William F. Taylor, the testator, died, and where letters testamentary were taken out by Samuel Savage; and the other from transactions in the State of Kentucky. Each of these branches will be stated separately.

William F. Taylor resided in South Carolina, where he had been naturalized in 1796. Savage lived with him for some time, and afterwards continued to reside in the vicinity. In 1811, Taylor died, leaving a will, which was admitted to probate on the 11th of August, 1811.

At the time of his death, the brother and sister of the testator, namely, Samuel Taylor and Mary Taylor, were both alive, married and had issue. Their children ultimately became parties to this suit, and their names are in the title of the case. Samuel Taylor had two sons, namely, William and George,

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and two daughters, namely, Eliza, who intermarried with William Primrose, and Elspet, who intermarried with George Porter. Mary Taylor intermarried with William Rainey, and her issue were two sons and a daughter, namely, William, Alexander, and Elizabeth.

The first section of William F. Taylor's will was as follows, namely :—

\*235] \**“*First. I do hereby order, will, and direct, that [on] the first day of January, first after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or may in any wise belong to me, be sold on the following terms and conditions, that is to say: All the personal property on a credit of twelve months from the day of sale, purchasers giving notes of hand or bonds, with security, to the satisfaction of my executors; and all landed or real property belonging, or in any wise appertaining to me, shall be sold on a credit of one, two, and three years, by equal instalments, purchasers to give bond, bearing interest from the date, with securities to the satisfaction of my executors, and, moreover, a mortgage on the premises.”

The second section gave a legacy to his negro woman Sylvia.

The third and fourth sections also bequeathed legacies to particular individuals.

The fifth and sixth sections were as follows :—

*“*Fifthly. I do hereby will, order, give, grant and devise all the remainder or residue of my estate which shall be remaining, after paying the before-mentioned legacies, to my dearly beloved brother, Samuel Taylor, of the parish of Drumblait and shire of Aberdeen, in Scotland, and to my beloved sister, Mary Taylor, of the same place, share and share alike, provided they shall both be alive at the time of my decease, and have issue, which issue, after their respective deaths, shall share the same equally; but if either the said Samuel Taylor or said Mary Taylor shall die without issue, then the survivor, or, if both shall be dead, the issue of the said Samuel Taylor or Mary Taylor, whichever shall leave the same, shall be entitled to the whole of the said remainder or residue of my said estate, share and share alike.

*“*And sixthly and lastly, I do hereby nominate, constitute, and appoint my friends, Samuel Savage, Esquire, of the district of Abbeville and State of South Carolina, Patrick McDowell, of the city of Savannah and State of Georgia, merchant, Duncan Matheson and William Ross, of the city of Augusta and State of Georgia, merchants, executors of this my last will



and testament; hereby revoking and making void all former wills and testaments, at any time by me heretofore made, and do declare this to be my last will and testament."

The executors all qualified as such. No bond was given, as neither the laws of the State nor the practice of the court required a bond from an executor under a will. This narrative will treat,

1st. Of the transactions in South Carolina where all the executors acted.

2d. Of the Kentucky lands, where Savage acted alone.

1. With respect to what was done in South Carolina.

On the 30th September, 1811, an inventory and appraisement were made of the goods and chattels of the deceased. But as the \*amount was not added up, it cannot properly be stated; and on the 18th of January, 1812, an [\*236 additional inventory and appraisement were made, which latter amounted to \$808.12. A list of notes and accounts due to the estate was also handed in by Savage, as one of the executors. Ross also filed a list of notes, bonds, and open accounts belonging to the estate in his possession.

In January, 1812, the four executors made sales of the real and personal property, amounting to \$24,011.46, and returned a list thereof to the Court of Ordinary. The law at that time did not require an account of sales to be recorded. After this, McDowell did not appear, by the record, to have any further participation in the settlement of the estate.

Savage, Matheson, and Ross, each filed separate accounts. Those of Matheson and Ross will be disposed of before taking up those of Savage.

Matheson filed but one account, namely, on the 30th March, 1813, by which a balance was due to the executor of \$281.76.

Ross filed three accounts, namely:—

1813, March 30th.	Balance due the estate,	\$4,034.80
1814, April 4th.	" " "	6,093.63
1815, April 4th.	" " "	6,299.77

Ross does not appear to have filed any further accounts, and what became of this balance the record does not show. It does not appear to have been paid over to Savage; but the complainants, in their bill, disavowed all claim against Ross.

Savage filed ten accounts, one in each year till 1818, April 22.

The last-mentioned account was as follows:—

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DR. *The Estate of Wm. F. Taylor, deceased, with Samuel Savage, Executor.* CR.

1818.

March 11,	V To cash paid ordinary,	\$1.75
	V " cash paid Butler & Brooks,	23.62½
	V " cash paid Butler & Hammond,	16.00
14,	V " cash paid James Day,	2.50
	" expenses to Edgefield court-house, and to Augusta,	25.25
22,	V " cash paid M. Mims, clerk, &c., for cost,	17.18½
	V " cash paid the clerk,	1.56½
		87.87½
	My commissions on \$10,398.42½, at 2½,	259.82
	" " 87.87½,	2.18
		<u>\$349.87½</u>

*287]	*V Cash paid the ordinary,	1.18½
	Expenses at Edgefield court-house,	5.00
April 22,	V Cash paid Adam Hutchinson, attorney for the parties interested,	10,037.36½
		<u>\$10,043.55</u>

1818.

March 14,	By balance due the estate, as per last return,	9,966.97½
	" cash received of adm'r L. Hammond,	180.00
	" cash received of adm'r Wm. Hall, it being the balance of his bond and interest, after deducting \$200, under a compromise of a land case,	246.45
		<u>\$10,398.42½</u>
	Deduct amount from the other side,	349.87½
		<u>\$10,043.55</u>
	Amount balanced,	<u>\$10,043.55</u>

The account current, received in the ordinary's office on the oath of Samuel Savage, executor, the 22d April, 1818, and find vouchers for every item marked with the letter V on the left-hand margin. JNO. SIMKINS, O. E. D.

At the time of filing this account, there was filed also the following receipt:—

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“Received of Samuel Savage, executor of the estate of Wm. F. Taylor, deceased, the sum of ten thousand and thirty-seven dollars and thirty-six and one quarter cents, in full of his actings and doings on the said estate up to this date, as per his account current this day rendered to the ordinary of Edgefield district. I say, received by me this twenty-second of April, anno Domini 1818.

SAMUEL TAYLOR,

WILLIAM RAINEY, and

MARY RAINEY, his wife.

Per ADAM HUTCHINSON,

*Their Attorney.”*

These accounts of Savage have been stated together, in order not to make a break in the narrative. It will be necessary now to go back in the order of time.

On the 14th of February, 1815, Savage applied, by petition, to one of the judges of the Court of Equity in South Carolina for authority to loan out the funds of the estate, praying the court to make such order as might seem equitable and just. Whereupon the \*court passed an order [\*238 that the petitioner should lend out the money on a credit of twelve months, on such good security as he might approve of.

At some time in the year 1815, Samuel Taylor came to the United States.

On the 9th of February, 1816, he executed the following paper:—

“GEORGIA, *City of Augusta*:

“Whereas, Samuel Savage, one of the executors of the last will and testament of William F. Taylor, late of Edgefield district, South Carolina, deceased, and Samuel Taylor, brother of the said William F. Taylor, deceased, for himself, and in behalf of his sister, Mary Rainey, and her husband, William Rainey, of Scotland, being desirous of adjusting the affairs of said estate, so far as have come to the hands of the said Samuel Savage, consent and agree that the said executor shall pay over to the said Samuel Taylor, at this time, as much money as he can spare, and on or before the first of April ensuing, to pay over all the money that may be collected on account of said estate. The said Samuel Taylor, for himself, and in behalf of his said sister Mary and her said husband, doth hereby consent and agree, on receiving from the said executor all the moneys that can be collected by the first of April next, to allow the said executor two years from this time to

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close the remaining business of said estate; and for the money heretofore deposited in the bank of Augusta, and which has since been put out at interest, no interest will be required of the said executor for said money during the time the same remained in bank; and [on] all moneys which may be collected hereafter by the said executor, no interest will be required, provided the same shall be paid over to the said Samuel Taylor, or his lawful agent, in a reasonable time after the same shall have been collected. The said executor hath permission to compromise all doubtful claims or debts due to the said William F. Taylor in his lifetime, or any litigated cases relating to the recovery of lands in South Carolina.

“Given under my hand, this 9th of February, 1816.

SAMUEL TAYLOR,

For himself, and for my sister,

MARY RAINEY, and

WILLIAM RAINEY, her husband.

“Test: NICHOLAS WARE.”

On the day of the execution of the above, namely, the 9th of February, 1816, Savage paid to Taylor \$5,300, and on the 26th of March following, the further sum of \$4,700, both of which are entered in the account settled on the 3d of February, 1817, with the Court of Ordinary.

On the 2d of April, 1816, Samuel Taylor executed a power \*239] of \*attorney to Adam Hutchinson and Peter Bennock, or either of them, authorizing them to receive on behalf of his sister, Mary Rainey, and her husband, William Rainey, all sums of money which were, are, or may become due and owing to the estate of the late William F. Taylor, and to sue for or prosecute all actions necessary for the recovery of a real estate in the State of Kentucky belonging to him, the said Taylor, and his sister.

On the 26th of September, 1817, Savage addressed a letter to Taylor, representing that there was great difficulty in collecting money due to the estate, his anxiety to bring the matter to a settlement, that during the winter he would be able to pay three or four thousand dollars, but that he must advance it out of money arising from the sale of a tract of land of his own, &c., &c., &c.

On the 22d of April, 1818, Savage paid to Hutchison the sum of \$10,087.36, as already mentioned.

In 1818, Savage went to Kentucky, and we pass on to the other branch of the complainants' claim; namely,

2. Transactions respecting Kentucky lands.

In order to understand the position of William Forbes Taylor, the testator, with regard to these lands, it will be necessary to recur to the original and subsequent titles.

On the 25th of May, 1786, Patrick Henry, governor of Virginia, in consideration of six land-office treasury-warrants, as well as by virtue and in consideration of a military warrant under the king of Great Britain's proclamation of 1763, granted to Daniel Broadhead, junior, a tract of land containing four thousand four hundred acres, beginning, &c., &c., &c.

On the 30th of September, 1786, Broadhead conveyed the land to William Forbes, of the city of Philadelphia, in consideration of the sum of £183, Pennsylvania currency.

On the 19th of February, 1794, Forbes conveyed the land to John Phillips, for the consideration of £37 10s.

On the 3d of June, 1802, John Phillips conveyed the same land to Mary Forbes, widow and administratrix of William Forbes, deceased, in trust for the right heir or heirs of the above-named William Forbes. The consideration was one dollar.

On the 17th of September, 1805, Mary Forbes, widow and administratrix, conveyed the land to William Forbes Taylor, of South Carolina, in trust for the right heir of William Forbes, deceased. The consideration was one dollar.

In 1808, Taylor went to Kentucky and caused about thirty ejectments to be brought against the occupants of the land.

In 1811, William F. Taylor died.

On the 14th of September, 1815, Mary Taylor, otherwise Rainey, and her husband, William Rainey, executed a power of attorney to Patrick McDowell and Samuel Taylor, authorizing them to sue for, &c., all houses and lands which belonged to \*William Forbes. The power contained the recital [\*240 the niece and one of the heirs of William Forbes, deceased, and of his intestate son, Nathaniel Forbes.

In 1818, Samuel Savage, the executor of Taylor, went to Kentucky, and whilst there executed two deeds, one to Alexander McDonald and others, and one to Zachariah Peters and others, for portions of the land in question. The sums which he is stated in the deeds to have received are \$800 in one case, and \$1,318 in the other.

In 1818, Savage removed from South Carolina to Tennessee, and afterwards to Alabama.

In 1836, William Primrose, who had married Eliza Taylor, the daughter of Samuel Taylor, went to Kentucky and made a compromise with many of the settlers on the land.

In June, 1837, Primrose visited Savage in Alabama and

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inquired what had become of the Kentucky lands, to which Savage replied that they had never been sold; but upon the production of the two deeds above mentioned, admitted that he had executed them, but denied that he had ever received any money for them.

In December, 1837, Savage died, and George M. Savage became his executor.

On the 1st September, 1838, the bill in this case was filed by Samuel Taylor, William Rainey, Alexander Rainey, and Elizabeth Rainey (all of whom were aliens, residing in Scotland), against George M. Savage, the executor of Samuel Savage, deceased.

The bill states that William F. Taylor, who was a native of Scotland, but a naturalized citizen of the United States, died in the Edgefield district, in South Carolina, about the year 1811, having first made his last will, which was duly proved and admitted to record before the Court of Ordinary in the Edgefield district, on the 11th day of August, 1811, and appointed Patrick McDowell, Duncan Matheson, William Ross, and Samuel Savage his executors, who, on the said 11th August, 1811, were duly qualified as such, and took upon themselves the trust reposed in them.

By the provisions of the will, the bill further states, after the payment of sundry legacies, all of which it is suggested were paid, the testator gave, granted, and devised all the remainder or residue of his estate, remaining after the payment of said legacies, to his brother, Samuel Taylor, of the parish of Drumblait, and shire of Aberdeen, in Scotland, and to his sister, Mary Taylor, of the same place, share and share alike; provided, that both of them were alive at the time of the testator's death, and have issue, which issue, after the respective deaths of his brother and sister, were to share the same equally; but if either of them should die without issue, then the survivor, or, if both should be dead, the issue of said Samuel and Mary, were to be entitled to the whole of the remainder or residue of said estate, share and share alike.

\*241] The bill further states, that the residuary legatees were alive at the time of the testator's death; that they were both legally married, and respectively had issue; that the sister, Mary Taylor, is dead, and that the complainants, William, Alexander, and Elizabeth Rainey, are her issue.

The bill further states, that the executors executed their trusts severally; that Matheson and Ross departed this life, the first in 1812, and the last 1816; that the principal part of the business appertaining to the estate in Georgia was

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under the management of McDowell, and that in South Carolina under that of Savage; that Matheson and Ross fully settled their accounts in their lifetime, and that the balances due from them have been fully paid to the complainants.

The bill further states, that the bulk of the testator's estate was in South Carolina, and was managed, as before mentioned, by Savage, and that an amount of property belonging to the estate, equal in value to \$100,000, went into Savage's hands, of which the sum of fifty thousand dollars has never been accounted for.

The bill further states, that, at the time of the testator's death, Savage was justly indebted to him, on open account, as stated on the testator's books, in the sum of \$789.70, which was never noticed in the inventory of Savage as returned to the ordinary; that he received, in cash on hand at the time of the testator's death, the sum of \$681.75, of which no return was ever made by Savage; and that Savage fraudulently concealed his indebtedness, and the receipt of the last-mentioned sum of money. In proof of these statements, an inventory and appraisement of the effects of the testator in South Carolina are exhibited, from which, it is alleged, it will appear that no returns were made of the last-mentioned liabilities, and from which it will also appear, as it is further alleged, no returns were made of debts due to the estate, although a large amount of debts due by bond, note, and account came to Savage's hands.

The complainants charge, that there is no account of sales returned to the Court of Ordinary by Savage; that a large quantity of valuable land in South Carolina was sold by the executors, the proceeds of which, to the amount of several thousand dollars, went into Savage's hands, and have never been accounted for; that they have examined the records of the said Court of Ordinary, and cannot find that any final settlement was ever made therein by Savage; that only partial accounts were rendered by him, of which they file transcripts as exhibits, marked from 1 to 10; that an item of \$10,037.55, in exhibit 10, which is alleged to have been paid to the attorney in fact of the complainants, is untrue; and they require proof, not only of the payment, but of the authority of Hutchinson (the person to whom it purports to have been paid), to receive it; that the exhibit 10 appears to be the last attempt on the part of Savage, to render [\*242 an account; and they charge the fact to be, that Savage retained \$3,232.31, for commissions and travelling expenses, without charging himself with any interest on the

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amount of money received by him, which alone would amount to the sum of \$5,000, up to the time that Savage alleges it to have been paid over by him to the legatees; and that amount, at least, with interest to the time of filing the bill, the complainants claim as their undisputed right.

The complainants further charge, that in the year 1818 Savage removed to Tennessee; that, in the same year, he went to Kentucky, where the testator had lands to a large amount and of great value; that he then fraudulently represented himself to be the only surviving executor of the said estate, although McDowell was still living; and that, regardless of the provisions of the will requiring the lands to be sold on a credit of one, two, and three years, with securities and a mortgage on the premises sold, Savage sold for cash 1,059 acres of the land for the sum of \$2,118; in proof of which they refer to exhibits D and C, which are copies of deeds executed by Savage to Alexander McDonald and others, to Zachariah Peters and others, of record in Kentucky.

They charge these lands to have been then worth eight dollars per acre, and would have sold for that, if the terms of the will had been complied with; and that the lands were worth at the time of filing the bill forty dollars an acre.

They further state that Savage, shortly after these sales, removed to Lauderdale county, Alabama, where he resided until his death, which occurred about the month of December, 1837; that he never made any return of said sales, but fraudulently concealed them from the complainants; that Primrose, the attorney in fact of the complainants, inquired of Savage, a few months before his death, if anything had ever been done with the Kentucky lands, and that he fraudulently answered that they were unavailable, and had never been sold; which statement he continued to make until the deeds were shown to him, and then he acknowledged he had sold them.

They further state, that the quantity of lands actually embraced in the deeds C and D was at least two hundred acres more than the quantity mentioned therein; that besides the lands above referred to, the testator had, in Kentucky, other lands to the amount of thirty thousand acres, more or less, of the value of \$500,000, all of which could have been sold by Savage, or by proper diligence secured to the estate; that he neglected to attend to the last-mentioned lands; that after they were secured to the testator by judgments at law, bills in chancery were filed by the settlers thereon, in the Kentucky courts, and through the gross neglect of Savage decrees



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were permitted to go in their favor, and the lands were lost.

They further state, that George M. Savage had become the personal representative of Samuel Savage, and they make him a defendant to the bill.

\*Finally. They pray for an account, and that the defendant, the executor, be decreed to pay the amount [\*243 due from Samuel Savage; that he be decreed to pay either the actual value of the Kentucky lands sold by Samuel Savage, or their present value, with interest; together with the value of the lands lost by Samuel Savage's negligence.

On the 25th March, 1839, George M. Savage, the defendant, filed his answer.

The answer denies that Samuel Savage undertook the execution of the will or the trusts therein, as regarded any property or effects whatever of the testator, or other duty, beyond the limits of South Carolina. On the contrary, as far as he had knowledge or belief, the will was never admitted to record or proven in any other State than South Carolina, nor did the executors qualify in any other State; and he expressly states, that they did not qualify, nor was the will ever proven or recorded, in Kentucky, to the defendant's knowledge; nor was it the right or duty of the executors to interfere with the testator's property situated in any foreign jurisdiction, beyond the limits of South Carolina, where the testator was domiciled at the time of his death.

The answer declines admitting that Samuel or Mary Taylor, or either, took any estate or interest in the property of the testator under the will, or that they are in any manner entitled under the same. On the contrary, he charges that the bequests in the will are void, and vest no interest or estate either in the said Samuel or Mary, either as legatees or otherwise, or in the complainants. Nor is it admitted that the complainants are the next of kin, having right to prosecute this suit; but, on the contrary, the supposed claim of Mary Taylor could only be prosecuted through the authority of her personal representative, legally appointed in the courts of the United States.

The defendant further states, that it is not true that the principal part of the business of the estate in South Carolina was under the management of Samuel Savage, exclusively; on the contrary, the four executors jointly executed and filed in the Court of Ordinary of the Edgefield district a true and perfect inventory of the estate, together with an account of sales of both real and personal estate, as appears by the exhibits L and M.

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The defendant further states, that Samuel Savage had nothing to do with estate in Georgia; that the property both real and personal in South Carolina, which came or ought to have come to the hands of the said Savage, was truly accounted for, as also appears by exhibits L and M, and the various settlements made by Savage from time to time in the Court of Ordinary, which are contained in exhibit N.

The defendant denies that there was any property or estate, or other effects of the testator, in South Carolina, which was not accounted for in the said court.

\*244] The defendant denies that \$100,000 of the testator's estate went into Savage's hands, full fifty thousand of which was never accounted for. On the contrary, the before-mentioned records exhibit a full and complete account of all property or effects which came or ought to have come into Savage's hands; all of which has been truly accounted for, and paid over to Samuel and Mary Taylor, or their agent.

The defendant denies the indebtedness of Savage for the account of \$789.70.

The defendant also denies the allegation in the bill, that Savage received \$681.75, cash on hand, at the testator's death.

The defendant also denies the charge of fraudulently concealing the before-mentioned items of indebtedness from complainants.

The defendant, further answering, states that the exhibit L corresponds with exhibit B in the complainant's bill, and denies that no return of debts due to the estate was made to the court by the executors; on the contrary, he avers that Samuel Savage and Ross, in January and February, 1812, severally returned and filed in the said court an inventory of the bonds, notes, accounts, and other claims due to the estate, as appears by exhibits O and P in the answer, which include all that was due from all sources, as far as the defendant has heard, knows, or believes.

The defendant, further answering, denies the allegation in the bill, that no account of sales was ever returned to the ordinary by Samuel Savage; on the contrary, the records show a complete and full return of sales, of both real and personal estate, made by Savage and the other executors.

The defendant also denies that a large quantity of valuable land in South Carolina was sold by the executors, and that the proceeds, to the amount of several thousand dollars, went into the hands of Samuel Savage; on the contrary, the executors sold no lands in South Carolina but what are fully accounted for to the said court.

The defendant insists that Samuel Savage, as the executor in South Carolina, on the 22d April, 1818, made a full, fair, and final settlement of all his transactions with said estate in the said Court of Ordinary, in presence of Adam Hutchinson, the attorney of the said Samuel and Mary Taylor; the accounts of the said Samuel Savage were then balanced, and the sum due from him paid over in said court to the said Hutchinson, as the attorney and agent aforesaid, as will appear by the exhibit N; and also by a copy of a receipt of Samuel Taylor and William Rainey and wife, by the said Hutchinson, as their attorney, executed in their name to Samuel Savage, on the 22d April, 1818, for the sum of \$10,037.36½, filed as exhibit T.

The defendant denies that Samuel Savage ever applied the money of the estate to his private use.

\*The defendant alleges, that the said Samuel Savage [\*245 stated to him that he had never made any interest out of the funds of the estate; and the defendant asserts that he believes the statement to be true.

The defendant, further states, that the complainants can set up no claim for interest, because, on the ninth of February, 1818, Samuel Taylor, for himself and his sister, the said Mary Rainey, and her husband, William Rainey, executed the exhibit S to the said Samuel Savage, which is an agreement, made under circumstances mentioned in detail by the defendant, in substance as follows:—The said Samuel Taylor, and the said William and Mary, agreed that Samuel Savage should pay over to the said Samuel Taylor, at that time, as much money as he could spare, and in the ensuing April to pay over such other moneys as might be collected on account of the estate; and the said parties agreed, on receiving all moneys that could be collected by the first of April ensuing, to allow the said Samuel Savage two years from that date to close the remaining business of the estate; that for the money theretofore deposited in the Augusta Bank, no interest was to be required for the time the same remained in bank; and that, on all moneys that might be collected by the said Samuel Savage, no interest was to be required, provided the same should be paid over to the said Samuel Taylor, or his agent, in a reasonable time after it was collected.

The defendant further states, that on the very day of the agreement Samuel Savage paid to Taylor, for himself and his sister, the sum of \$5,300, as appears by Taylor's receipt. And on the 26th March, 1816, he again paid the sum of \$4,700, as per Taylor's receipt; that Samuel Savage pro-

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ceeded with all dispatch to close the remaining business, and in April, 1818, as before stated, made the final settlement of the estate; all which, it is insisted, is a complete bar to interest.

The defendant further states, that Samuel Savage did not retain the sum of \$3,232.31 for commission and travelling expenses; but the exhibit N will show what he did retain, which the defendant insists was a reasonable sum, and came before the ordinary for examination.

The defendant further states, that as late as March, 1816, Samuel Taylor was satisfied with the manner in which Savage conducted the business of the estate, as appears by a copy of a letter dated 26th March, 1816, exhibit Z; that shortly after the date of this letter, Taylor left the United States, having first constituted the said Adam Hutchinson the agent of the legatees to supervise the management of the estate, and finally to settle it, and receive the moneys. And a copy of the power of attorney to Hutchinson is exhibited, G, the original being destroyed.

From that time no further claim is set up, and the whole business sleeps for more than twenty years, when this attempt is made to overhaul the accounts and settlements before the ordinary.

\*246] \*The defendant, therefore, insists,—

1. That the settlements are absolutely conclusive, and that it is not competent for any other court to open and inquire into the correctness or regularity of the proceedings before the ordinary.

2. That, if not conclusive, they are *prima facie* evidence of the correctness of the settlements.

3. Upon the statute of limitations and lapse of time, as evidence that the estate has been settled, and all the moneys paid over.

As to the Kentucky lands, the defendant states he is informed, and believes, that the testator was not the owner of any lands in that State at the time of his death, or since; that a suit was there pending many years before his death for 4,000 or 5,000 acres of land, and prosecuted till the 8th of January, 1818, when judgments were recovered, &c., is not denied; and the defendant has been informed that Primrose, the pretended agent of the complainants, in the year 1836, made a compromise with the tenants in possession of the said lands, by which, for an inconsiderable sum, he agreed to release the claims of the complainants. But if, on investigation, it should be that the testator had title, then the defendant insists,—

1. That that title, upon his death, escheated to Kentucky; and that if the lands were ever subject to trusts, such as those in the will, the same were lost when the lands escheated, and could not be enforced, either in law or equity.

2. That the power to sell being a naked power, and having been conferred on four executors, could not be executed by one, so as to convey the title.

The defendant admits that Samuel Savage, in the year 1818, did go to Kentucky, and that he executed the papers D and C, exhibited in the bill; but he denies that he fraudulently represented himself as the only surviving executor; and he also denies that the execution of the deeds violated the provisions of the will, or that he had authority, however he may have thought so himself, to convey the lands under the will.

The defendant further insists, that the sales were merely void, and did not affect the rights of the complainants, on another ground,—that McDowell, another executor, was alive at the date of the deeds, and did not join in the conveyance.

The defendant further denies that the lands in Kentucky were sold for cash, but for an inconsiderable amount in property.

And, if it shall be material, he pleads, as to the consideration for the sale of those lands, the statute of limitation and lapse of time.

The defendant admits that Samuel Savage died in November, 1837, in Lauderdale county, Alabama, where he was domiciled; that the defendant is the executor of his will, and is a citizen of Alabama.

Finally, the defendant pleads to the jurisdiction of the court.

On the 31st May, 1839, the complainants filed an amended bill.

\*They admit therein, that the domicile of the testator was in South Carolina. [\*247

That his father and mother died before his death.

That Samuel Taylor was his only brother, and Mary Taylor his only sister.

That she intermarried with William Rainey, and had issue the three other complainants.

That the testator had no kindred in the United States at the time of his death.

And that the said Samuel and Mary were, at that time, his only heirs at law.

The complainants further state, that Samuel Taylor visited

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South Carolina in 1815, for the purpose of settling with the executors; and that he received, in February and March, 1816, from Samuel Savage, the sum of \$10,000, as part of the estate; but no interest was paid, for the reasons assigned by him.

That Savage wrote to Taylor, in September, 1817, a letter, which is exhibited, and the substance of which is set forth. Exhibit I.

That the legatees never received any moneys afterwards.

That Savage never made a final settlement of his accounts.

That, after his removal from South Carolina, he received at least \$10,000 of the money of the estate.

That, since filing their bill, they have received the testator's cash-book, from which it appears that Savage was indebted, as is alleged in the original bill, at the time of the testator's death.

That the executors did not execute any bond for the faithful execution of their trusts, &c.

The answer of the defendants was filed on the 19th day of September, 1839, and in almost every particular traverses the allegations of the amended bill. It need not, therefore, be set forth at length.

These were the issues between the parties.

The District Court, after a careful review of all the points in the cause, decreed, that the complainants recover of the defendant the sum of \$5,212.92, to be levied of the goods and chattels, lands and tenements, of the said Samuel Savage; and that the defendant pay the costs of the suit.

The above sum of \$5,212.92 was made up of the principal sum of \$2,118 received by Savage on the 21st July, 1818, from the sale of the Kentucky lands, and interest on that amount from the said 21st July, 1818, to the commencement of the term of the court when the decree was rendered, amounting to the sum of \$3,094.92.

On the day before the decree was rendered, George M. Savage, the executor of the last will of Samuel Savage, was removed from his office of executor by the court in Alabama having jurisdiction to make the removal, and Vincent M. \*248] Benham was appointed the \*administrator *de bonis non*, with the will annexed, of the said Samuel Savage.

The complainants appealed from the decree, and executed bond to prosecute the appeal. They complained that the District Court erred in not decreeing the whole amount claimed by them in their bill and amended bills. But they ordered execution to issue for the amount for which the decree was rendered, which was levied on a large number of

slaves, which were claimed as belonging to the estate of Samuel Savage.

An order granting an appeal to the defendant George M. Savage was also made by the court, and bond was ordered to be given within a stipulated time; but in consequence of the removal of George M. Savage the order could not be executed, and no bond was executed in conformity with the order.

Upon a motion made to this court by Benham, at the January term, 1843, the execution that issued on the decree was held to be a nullity, and an intimation given that the decree was not rendered against the proper party in the District Court.

On the 4th October, 1844, a bill of revivor was filed by the complainants against Vincent M. Benham, the administrator *de bonis non* of Samuel Savage, and he was brought before the court by process.

In November following, Benham filed his answer to the bill of revivor, and a demurrer at the same time.

The causes of the demurrer were,—

1. That the bill of revivor did not state the proceedings and relief prayed by the original bill.

2. That it did not show or allege that the defendant ever had any assets belonging to the estate of Samuel Savage.

3. That the defendant, as administrator *de bonis non*, with the will annexed, of Samuel Savage, could not be made a party to the original bill by bill of revivor.

4. That the defendant, as such administrator, was not in privity with George M. Savage, against whom the decree was rendered; and for want of that privity, a bill of revivor would not lie.

5. That the bill of revivor did not show whether the decree was rendered before the removal of George M. Savage as executor.

The court overruled the demurrer.

The answer stated, that the defendant had no personal knowledge of the original suit, or of the proceedings and decree therein. It admitted that the removal of George M. Savage from his office of executor, on the 28th November, 1842, and that the defendant, on the same day, within a few hours afterwards, was appointed administrator *de bonis non*, with the will annexed, of Samuel Savage, by the same court. It alleged, that at the time the original decree was rendered against George M. Savage, the defendant Benham was the administrator *de bonis non*.

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\*249] \*On the 29th November, of the same term, the defendant Benham moved the court to dismiss the suit for want of prosecution; which motion was overruled.

The District Court, notwithstanding the defendant's answer, ordered that the decree against George M. Savage, as executor of Samuel Savage, be revived against said Benham, administrator *de bonis non*, with the will annexed, of Samuel Savage, and the defendant Benham prayed an appeal.

Upon these cross appeals the cause came up to this court.

It was argued by *Mr. Morehead* and *Mr. Sergeant*, for Savage's administrator, and by *Mr. Crittenden* and *Mr. Berrien*, for Taylor, &c.

*Mr. Morehead.* I. For the reasons alleged in the defendant's demurrer to the complainants' bill of revivor, the demurrer ought to have been sustained, particularly because it was erroneous to revive a decree against the administrator *de bonis non*, which had been rendered against the executor of Samuel Savage. *Grout v. Chamberlain*, 4 Mass., 611; *Allen v. Irwin*, 1 Serg. & R. (Ia.), 554; *Alsop v. Mather*, 8 Conn., 584; *Carrol v. Connett*, 2 J. J. Marsh. (Ky.), 199, 206; *Bradshaw v. Commonwealth*, 3 Id., 133; *Graves v. Downey*, 3 Mon. (Ky.), 353; *Slaughter v. Froman*, 5 Id., 20; *Potts v. Smith*, 3 Rawle (Ky.), 361; *Bank of Pennsylvania v. Halderman*, 1 Pa., 161; *Kendall v. Lee*, 2 Id., 482; *Hagthorp v. Hook's Administrators*, 1 Gill & J. (Md.), 270.

On the merits:—1. The bill having been filed with the obvious design of making the executor of Samuel Savage liable for the fiduciary delinquencies of the said Samuel, as one of the executors of Taylor, it was erroneous to decree against him for the personal acts and misconduct of the said Samuel. *Dance v. McGregor*, 5 Humph. (Tenn.), 428.

2. The letters testamentary granted in South Carolina conferred no power or authority on the executors of Taylor to act without the jurisdiction of that State. *Carmichael v. Ray*, 1 Rich. (S. C.), 116; *Kerr v. Moon*, 9 Wheat., 565; *Doolittle v. Lewis*, 7 Johns. (N. Y.) Ch., 45, 47; *Attorney-General v. Bouwers*, 4 Mees. & W., 171, 190, 191, 192; *Story*, Conf. of L., p. 425, § 514.

3. The sale of the Kentucky lands, therefore, by Samuel Savage, did not divest the residuary legatees of Taylor of any title they may have had to those lands, or of any interest in the same.

First. Because the authority conferred by the will on the executors to sell the real estate must have been strictly pur-



sued. *Williams v. Peyton's Lessee*, 4 Wheat., 77; *Wiley v. White*, 3 Stew. & Pr. (Ala.), 355; 4 Johns. (N.Y.) Ch., 368; 6 Conn., 387; 2 Swinb., 730, note; 10 Pet., 161.

Secondly. Because the authority, being joint, could not be \*executed and performed by one only. *Halbert v. Grant*, 4 Mon. (Ky.), 582; *Smith v. Shackelford*, 9 [\*250 Dana (Ky.), 472; *Johnston v. Thompson*, 5 Call (Va.), 248; *Carmichael v. Elmendorff*, 4 Bibb (Ky.), 484; 14 Johns. (N. Y.), 553; Co. Litt., 112, b.

4. The devise of the testator's real estate to be sold conferred an authority by implication on the executors to sell. *Anderson v. Turner*, 3 A. K. Marsh. (Ky.), 131. But it was a naked authority, uncoupled with an interest; and the lands, until the sale was made, descended to the heirs at law of the testator. *Ferebee v. Procter*, 2 Dev. & B. (N. C.), 439; *King Ferguson*, 2 Nott & M. (S. C.), 588; *Shaw v. Clements*, 1 Call (Va.), 429; *Warneford v. Thompson*, 3 Ves., 513; *Hilton v. Kenworthy*, 3 East, 557; Co. Litt., 236, 112, 113, 181; 2 Sugd. Powers, 173, 174.

5. The will of William F. Taylor was never offered for probate, or proven in Kentucky by Samuel Savage, or by either of the executors. As to the real estate, therefore, which was in Kentucky. William F. Taylor died intestate. *Kerr v. Moon*, 9 Wheat., 565; *McCormick v. Sullivant*, 10 Id., 202; *Carmichael v. Ray*, 1 Rich. (S. C.), 116; *Smith v. Shackelford*, 9 Dana (Ky.), 472. And the lands descended, of course, to his heirs at law.

The complainants were his heirs at law, as well as residuary legatees, and they were, at the time of the testator's death, *aliens*. It follows, that they could not take the Kentucky lands, which fell by escheat to that commonwealth *without office found*. *Montgomery v. Dorion*, 7 N. H., 475; *Mooers v. White*, 6 Johns. (N. Y.) Ch., 360; *Doe v. Jones*, 4 T. R., 300; *Doe v. Acklam*, 2 Barn. & C., 779; *Doe v. Mulcaster*, 5 Id., 771. *Sutliff v. Forgey*, 1 Cow. (N. Y.), 89; *Dawson's Lessee v. Godfrey*, 4 Cranch, 321; Co. Litt., 2, b.

6. That the complainants have disaffirmed the sale made by Samuel Savage of the Kentucky lands, by having since sold and conveyed the same lands. This they could not do and still insist on Savage's liability for the sale made by him. If he sold the lands in Kentucky in violation of his trust, the beneficiaries of Taylor cannot demand to have the lands and also the purchase-money received for them. By following the title to the lands they repudiate the sale made by Savage. *Murray v. Ballou*, 1 Johns. (N. Y.) Ch., 581; Id., 445; Story, Eq. Jur., 505-507; 5 Ves., 800.

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7. That in April, 1818, a final settlement was made in the proper court in South Carolina of all the official transactions of Samuel Savage, as executor of Taylor, and that such settlement could only be impeached or disturbed by surcharging and falsifying the same by specific allegations and proofs of error or omission. *Wooldridge's Heirs v. Watkin's Executor*, 3 Bibb (Ky.), 352; *Quinn v. Stockton*, 2 Litt. (Ky.), 346; *Vance's Administrators v. Vance's Distributees*, 5 Mon. (Ky.), \*251] 521; *Preston, Executor, v. Gressom's Distributees*, 4 Munf. (Va.), 110; *Owens v. Collinson*, 3 Gill & J. (Md.), 25.

8. That William F. Taylor had no title which he could transmit by will to the lands devised to be sold, he being a trustee only, holding the legal title for the use and benefit of others, not parties to this suit.

9. That the District Court of Alabama had no jurisdiction to adjudicate upon the matters contained in the bill and amended bill of the complainants. It was manifestly a suit against the executor of Samuel Savage, for a final settlement of the fiduciary accounts and transactions of the latter as executor of Taylor. The courts of South Carolina alone had jurisdiction of the matters in controversy between the parties, and the District Court ought to have dismissed the complainant's suit. *Vaughan v. Northup's Administrators*, 15 Pet., 1; Story, Conf. of L., §§ 513, 514, to the end, pp. 422-426.

*Mr. Crittenden*, for Taylor, &c., relied upon the following points and authorities.

1. That the peremptory direction given in the will of William F. Taylor, to sell his lands, &c., is equivalent, in every equitable sense, to a devise to his executors and the survivor of them, with authority to sell, and will equally prevent an escheating of the land. 7 Dana (Ky.), 1-12, &c.

2. That although it was a prerequisite to his legal authority to sell the Kentucky lands, that he (Samuel Savage) should have obtained letters testamentary in Kentucky; yet, if without it he took upon himself to act under the will of his testator, to make sales and receive money of them, as executor, he cannot, because of that irregularity, excuse himself from his responsibility to the complainants, the legatees, for that money so received; as executor he received it, and as executor he must account for it. 7 Dana (Ky.), 349. Their authority was from the will. 7 Dana (Ky.), 351-355.

3. That the least measure of his responsibility is the amount of money he received, as executor, on the sales of Kentucky lands made by him as executor, and that he cannot be allowed

to evade that by any impeachment of the sales made by himself.

4. That having undertaken to act in reference to said lands in Kentucky, he was bound to fulfil his undertaking and the trust assumed by him, and is responsible for the damage or loss of land occasioned by his failure so to do, and by his inattention and negligence. 7 Dana (Ky.), 349.

5. That, in respect to the land in Kentucky which he did sell, he is liable for the fair value of it, or the price at which he could have sold it at the time, which was much greater than the price at which he did sell.

6. That the removal of Samuel Savage from the State of South \*Carolina; the residence of the complainants in a foreign and distant land, and the coverture and in- [\*252 fancy of some of them; the misstatements, equivocations, and fraud of the said Savage, and his concealments from the complainants of his transactions in respect to said lands, especially, exclude him from all benefit or advantage from lapse of time or the statute of limitations. 1 Madd. Ch., 98, 99; 2 Id., 308-310; 10 Wheat., 152; 1 Sch. & L., 309, 310, 428-431, 413-442; 2 Id., 629, &c.

The money received by Savage, as executor of Taylor, for land sold by him as executor, ought to be accounted for by him as other moneys arising from the estate of his testator. He did so account for the proceeds of the land sold in Carolina. And why should he not for the proceeds of the Kentucky lands? He charged the estate for going to Kentucky to attend to those lands, &c. He did give some attention to, and did sell a portion of, them. And what, now, are the objections made to his responsibility? They are, in substance,—

1st. That he was not bound to attend to them, as executor only in South Carolina.

2d. That complainants were aliens, and that the land escheated on the death of the testator, Taylor.

3d. That complainants have lost or waived all right by the statute of limitations and lapse of time.

4th. That they have lost or waived all right of recovery against him by the compromises and sales made by their agent, Primrose.

To the first, it is deemed a sufficient answer to say, that he did assume and undertake to attend to those lands, and was paid for it. And that was enough to charge him for a due responsibility for his performance of his undertaking,—to charge him as agent or executor *de son tort*, if not otherwise. 7 Dana (Ky.), 349, 351-355.

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But, moreover, he was in the nature of a trustee under the will, and having undertaken the trust by assuming the office of executor in South Carolina, he was bound to fulfil the whole trust by proving the will in Kentucky, or by doing whatever else was necessary to a complete and faithful performance of it.

The testator contemplated this, as is clearly inferable from his will. Savage was not merely an executor, in the ordinary sense, but as to the lands of the testator he was in the condition of a trustee. And, accepting the trust, he must perform the whole of it, as much as if he had accepted the same trust created by deed instead of will. The power given by the will, in respect to the lands, is different from and collateral to the mere official power of an executor, and constitutes him in effect a trustee whose powers and duties are not governed by the rules or laws which regulate mere executorial duties. His duties in the one case depend on the laws which regulate his office; in the other, on the nature of his contract or undertaking.

\*253] \*As to the second objection, that the lands escheated, &c., the answer is, that it is too late to urge that defence against his own act in selling them and receiving money for them.

But it is, moreover, insisted that the lands did not escheat. It is settled that lands devised to be sold and the money paid to aliens do not escheat. *Craig v. Leslie*, 3 Wheat., 563; *Craig v. Radford*, 3 Id., 594.

The direction given in this case to sell is a trust in the contemplation of a court of equity, and will be enforced as such, just as if the land had been devised on trust for the same purposes. 1 Madd. Ch., 55 (56); *Harding v. Glyn*, 1 Atk., 469; *Clay & Craig v. Hart*, 7 Dana (Ky.), 1-12, &c.; Co. Litt., 113 a, and note (2), which see; 3 Co. Litt., 146, note, 113 a; 2 Sugden, 173.

And even the non-execution of the powers would not defeat the trust; the general rule in equity is, "that a trust shall never fail of execution for want of a trustee," &c. 1 Madd. Ch., 455-458; Co. Litt., and note, as above referred to; 2 Atk., 223.

As to the third objection, neither the statute of limitations nor lapse of time apply to this case. The circumstances of the case, and the fraud and concealment, exclude them from any operation on the case. The suit was brought immediately on the discovery of the cause of action. 1 Madd. Ch., 98, 99; 2 Id., 308, 310; *Elmendorf v. Taylor*, 10 Wheat., 152; 1 Sch. & L., 309, 310, 428, 431, 413-442; 2 Id., 629, &c.

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Fourth objection. The facts answer this, and it seems but a mockery to insist on the last desperate effort at compromise as releasing defendant.

*Mr. Berrien*, on the same side with *Mr Crittenden*.

It is objected by the opposing counsel, that this decree cannot be revived against defendant, because, as administrator *de bonis non*, he has no privity with George M. Savage, the executor of Samuel. But what are the facts in the case?

(*Mr. Berrien* here reviewed the facts, and then proceeded.)

The privity which is necessary in this case is privity with Samuel Savage, against whose estate the decree was rendered, and out of whose assets it was payable.

If a decree is obtained against an executor, for the payment of a debt of his testator, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets may be pursued in his hands, without reviving against the representative of the original defendant.

If George M. Savage had died intestate, his administrator would not have been the representative of Samuel Taylor. In this event, this suit might have been revived against the administrator *de bonis non* of Samuel Taylor. Story, [\*254 Eq. Pl., § 370; Mitf. Eq. Pl. by Jeremy, 78; *Johnson* v. *Peek*, 2 Ves., 465.

Then having been removed from office, under the statute of Alabama,—having no representative who can represent the estate of Samuel Taylor,—it is only against his administrator *de bonis non* that this proceeding can be had; or there is a right judicially ascertained, without a remedy.

As to the Kentucky lands.

The first objection is, that the District Court of Alabama, acting as a Circuit Court, had not jurisdiction of this case. When I encounter an argument, leading to a conclusion from which the intelligence of professional men must, in my judgment, revolt, however it may seem to be supported by authority, I am disposed rather to distrust my own capacity to detect its fallacy, than to yield to the conclusion to which it would lead me. I am sure I am not singular in this feeling. Let us examine the conclusion to which the argument would lead.

Samuel Savage left the State of South Carolina in 1818, removed first to Tennessee, and afterwards to Alabama, where he settled permanently, and died.

After 1818, he was not suable in South Carolina.

Not in the State courts. It does not appear that he was

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ever there after that time; and if he had been transiently there, complainants, aliens, residents in a foreign country, were not required to be on the watch to catch him there. No original process issued by the State courts of South Carolina, which was not personally served, could have rendered a citizen of Alabama amenable to their jurisdiction.

Not in the courts of the United States in the District of South Carolina, for the words of the Judiciary Act of 1789 are,—“No civil suit shall be brought in the courts of the United States against a defendant, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”

The conclusion, from the proposition of defendants, then, is this,—that until Samuel Savage chose to go to South Carolina, and subject himself to the service of process, he was not liable to suit anywhere; that complainants were remediless, or that their right to a remedy depended upon the will of their adversary. Is the jurisprudence of the United States subject to this reproach? Has this court pronounced any decision which may, by fair construction, lead to such a consequence? This is said to be the age of progress; but is it a progress in intelligence, or its opposite? What is the reference to authority on this point?

(*Mr Berrien* here examined and commented on 14 Pet., 166; Story, Conf. of L., §§ 513, 514; 15 Pet., 1.)

We are seeking to obtain from this defendant, as administrator *de bonis non*, the balance which was in the hands of Samuel Savage of the estate of W. F. Taylor, of which we are legatees. We charge him, and we prove our charges, with fraudulent concealment of the assets which came to his hands; and we seek to make his estate, in the hands of defendant, liable for his individual personal default; and this right, with the aid of a court of equity, we can enforce wherever we find him.

If he had remained in South Carolina, we would of course have sought redress there, and in its courts. But he voluntarily withdrew from the protection of those courts. He was a fugitive from justice, liable to arrest wherever he was found.

The bill, it is said, seeks an account; but not that merely. It alleges fraud and concealment; it charges Samuel Savage with official misconduct, for which it holds him to individual responsibility; it does not ask him to pay for these frauds out of the assets of W. F. Taylor, which he has wasted, but out of his own estate, into which those assets have been converted.

The proposition, that the courts of South Carolina have exclusive jurisdiction, cannot be urged as an objection to the jurisdiction of the Circuit Court of Alabama. Their exclusive jurisdiction is over the subject-matter,—the administration. The executor is personally amenable to the forum of his domicile. There he may rely on a settlement and discharge by the courts of South Carolina, as having exclusive jurisdiction of the subject-matter, and the acts of the court of South Carolina should have like effect in the court of Alabama as they would have had in the State in which they were rendered; but this is the extent of the exclusive jurisdiction which can be claimed for them, in behalf of an executor who is a fugitive from their borders.

The third, fourth, and fifth points of the respondent's statements will be considered jointly.

1. The order of testator, that his lands should be sold,—especially that they should be sold on “securities to the satisfaction of his executors,”—gave to them a power, an authority to sell, by implication, but as ample as if it had been given by express words.

The appointment of his executors, and the appropriation of the proceeds of the sales, so to be made by them, to purposes within the scope of their duties as executors, which he did by the devise of all the remainder or residue of his estate, after payment of certain legacies, imposed upon them an obligation, and charged them with a trust,—that of so appropriating them.

The executors were the agents of the testator, his attorneys, if you will, but more properly donees of the power conferred on them by him for the sale of these lands. But they were also trustees of the devisees, in relation to the fund thus acquired. They had no interest in that fund; but the authority conferred on them was not, therefore, a mere naked power. It was a power coupled with a \*trust, which [\*256 it is the peculiar province of a court of equity to guard and to enforce. 2 Story, Eq. Jur., §§ 1059–1061. And a court of equity will construe the will to give them such an interest as is necessary to the execution of the trust.

But we are seeking to make Samuel Savage, who was only one of these trustees, alone liable for the faithless execution of his trust, and we are met with the objection,—

1. That the authority and the trust, being joint, could not be executed by one only. There are numerous decisions on this question. 2 Story, Eq. Jur., § 1062. The whole doctrine is summed up by Mr. Sugden. Sugd. Powers, ch. 3, §

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2, art. 1, pp. 165, 166 (3d edit.); 2 Story, Eq. Jur., p. 399, in note.

A power coupled with a trust will survive, and may be executed by a surviving trustee. *Osgood v. Franklin*, 2 Johns. (N. Y.) Ch., 1-21.

Power to executors to sell, not by name, but as executors, may be executed by one. *Clay & Craig v. Hart*, 7 Dana (Ky.), 1.

Where one of several trustees refuses to accept, the power vests in the others. *King v. Donnelly*, 5 Paige (N. Y.), 46.

2. It is objected, that as this was a naked power (that is, as there was no express devise to trustees), the land must have descended to the heirs, to await the exercise of the power; that as the will was not proved in Kentucky, and therefore *quoad* testator's property in that State he died intestate, it must for that cause also have descended to the heirs; and as these heirs were aliens, it vested by escheat in the State of Kentucky.

The answer is, that a court of equity will carry out the manifest intention of a testator, will see that this trust is executed according to such intention, and will raise such an estate by implication in the trustee as is necessary to accomplish this object. The court will imply a power to sell in executors not expressly designated for this purpose. 2 Story, Eq. Jur., § 1060. They will imply such a power, from an authority to "raise money" out of lands. *Id.*, § 1063. Nay, they will imply a power to sell, from a power to raise money out of "rents and profits." *Id.*, § 1064. As a power to sell will be raised by implication, not only without but against the words of the will, as in the case cited, "rents and profits." As a trust to appropriate proceeds will in like manner be implied, in both cases, to effectuate the intention of testator, so also where there is no express devise, implication will not stop short of a fee where there are trusts to be executed which require it. *Markham v. Cooke*, 3 Burr., 1686. In *Trent v. Henning*, 4 Bos. & P., 116, the devise to trustees, as well as the trust for sale, was implied, and yet they took a fee. *Fletcher. Est. Trust.*, 1-4, 19.

I am aware of the cases which decide that a mere naked power to executors to sell will not give an interest; but,—

1. This is not a mere naked power; taken in connection with the devise of the residue, it is a power coupled with a trust.

\*257] \*2. It is indispensable, to effectuate the intention of the testator, that such an interest should pass.



In the cases referred to, the question was between heir and distributee, or devisee, or creditors. The land descended to the heir, subject to the exercise of the power, and the intention of the testator was accomplished. According to the argument of respondent's counsel, that cannot be in this case, unless such an interest is held to pass.

Yes, there is another mode. Land directed to be sold and converted into money loses the quality of real, and is converted into personal estate, and *e converso* of money directed to be laid out in land. 2 Story, Eq. Jur., § 790. In this latter case, anterior to the sale, and by the mere force of the will, the money so fully becomes land as, 1. not to be personal assets; 2. nor to be subject to the courtesy of the husband; 3. nor to pass as land by will, and other consequences. So of land directed to be sold. 2 Story, Eq. Jur., § 109, in note; *Hawley v. James*, 5 Paige (N. Y.), 318.

As to the time when the conversion shall be supposed, *Hutcheon v. Mannington*, 1 Ves., 365; *Clay & Craig v. Hart*, 7 Dana (Ky.), 1.

It is objected, that the will was not proved in Kentucky. But probate was not necessary to the execution of the power, and adds no force to it, for the probate has no concern with the power, and relates only to the jurisdiction over the goods and chattels. *Doolittle v. Lewis*, 7 Johns. (N. Y.) Ch., 48; *Lessee of Lewis and wife v. M'Farland et al.*, 9 Cranch, 151.

The intention of the testator can be effected, then, in one of two ways:—

1. By construing the will so as to imply a devise to the executors for the purpose of effectuating the trust.

2. By considering the land as money from the death of the testator, when his will became operative.

The testator was a naturalized citizen. All his relatives were aliens, and incapable of holding real estate. Aware of this disability, he directs his property, real and personal, to be converted into money, and bequeathes it to them. There can be no doubt of his intention to give to his executors such power as was necessary to effectuate his will. That will became operative upon his death, and did not depend upon the probate. The court will imply a power to sell. They will imply a trust to distribute. Will they not consummate the intention of the testator, either by considering the land as money at the time of his death, or by giving to the trustee such an estate as is necessary to protect the land from escheat? *Craig v. Leslie*, 3 Wheat., 577. The lands in possession of the heir are held subject to the exercise of the power. Why should it not be in the hands of the State?

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\*258] Or is the lord, who takes by \*escheat, more favored than the heir, who takes by inheritance? *Pawlett v. Attorney-General*, Hardr., 465, 469; 2 Atk., 223.

But however these questions may be decided, defendant cannot evade the equitable demand of complainants. Whether this power was capable of being executed separately by Samuel Savage, or whether, for want of an express devisee, it was incapable of being executed at all, the defendant cannot escape.

An affirmance of the positions for which we contend will increase the amount for which he is answerable; a denial of them will not release him from responsibility. He can only escape by maintaining, that the fraudulent assumption of the character of the trustee of these complainants, the concealment from them of his actings and doings while professing to act as their trustee, the receipt of money in that character, the denial of such receipt, and the conversion of it to his own use, are wrongs which a court of equity is incompetent to redress.

(*Mr. Berrien* here stated and commented on the facts respecting the Kentucky lands.)

In every event, complainants are entitled to a decree for the amount actually received by Samuel Savage, and that with compound interest. It may be admitted that complainants had no title to the land which they could have enforced, that they have obtained by compromise what they could for the land; still, the money received by him was their money; it diminishes the amount which they obtained by the compromise, it was paid by the tenants of the land to him, professing to act as their trustee; it was received by him in that character and has been converted by him to his own use, and fraudulently withheld from them. A court of equity will not permit him thus to abuse the trust which he assumed.

An executor is liable for the value of an estate sold by him without authority. *Smith et al. v. Smith's Executor*, 1 Desau. (S. C.), 304; 1 Paige (N. Y.), 147; 6 Id., 355. He is liable to compound interest in case of fraud or wilful neglect. *Schiefflin v. Stewart*, 1 Johns. (N. Y.) Ch., 620; *Myers v. Myers*, 2 McCord (S. C.) Ch., 266; 1 Hopk. R., 423; 2 Johns. (N. Y.) Ch., 1.

Defendant cannot be protected by the statute of limitations from a decree for this amount. The bill charges, and the evidence proves, that this transaction was fraudulently concealed from complainants, and there is evidence to sustain it. Fraud and trust are not within the statute of limitations, as

it does not begin to run until the fraud is discovered. *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch., 122. There is an express allegation of the bill as to the time when the fraud was discovered.

Nor can the question of jurisdiction ever arise, as to this part of the case. Savage never acted under the authority of any court of Kentucky, which may be supposed to have had exclusive jurisdiction of this matter.

\*It is submitted, then, that on this part of the case we are entitled at least to \$2,118.00, with interest [\*259 thereon at six per cent from 21st July, 1818, compounding the same.

As to the estate in South Carolina.

(*Mr. Berrien* here went into a minute examination of the accounts, which is omitted, as the opinion of the court did not consider the question open.)

To protect himself from this claim, defendant relies on several grounds:—

1. That he was not liable to suit in Alabama.
2. That he made a final settlement.
3. The statute of limitations, and lapse of time.

The argument against the jurisdiction of the Circuit Court of Alabama has been already considered.

The final settlement. A bare inspection of the accounts will show that it was not final. It was not so recognized by the ordinary, but styled an "account current," and so recorded by the ordinary. The payment of the balance due to Hutchinson, if he had had power to receive it, would not make it a final settlement. Hutchinson did not so receive it. His receipt is, merely for the actings and doings of Savage up to the date, as per his "account current," not "final settlement." To make it a final settlement he should have charged himself with the amount of sales, and interest on each note until it was paid, for the notes given at the sale bore interest.

2. The amount of the notes and open accounts found at the time of Taylor's death, and interest on the former, which came to Savage's possession.

3. If any of these were desperate, this should have been stated.

4. He should have charged himself with interest on the annual balances remaining in his hands.

Instead of this, it was a mere annual account current, crediting such receipts as Savage chose to acknowledge, and charging such payments as he alleged to have made. All that the ordinary did was to examine the vouchers for the

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payments. He could make no final settlement, because there was no exhibit of the assets.

As to the statute of limitations. Fraud and trust are not within the statute; it does not begin to run until the fraud is discovered. *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch., 122; 3 P. Wms., 144, 145; 2 Story, Eq. Jur., § 1521. The circumstances must be forcible to induce the court to make lapse of time a bar to the claims of heirs and legatees for an account and settlement of the estate. *Gist v. Cattel*, 2 Desau. (S. C.), 53. Infancy and coverture will prevent the statute from running. The children of Samuel Taylor were infants; Mary Taylor (Rainey) was a feme covert. Respondents urge, that complainants are barred by the statute of limitations of Alabama, because they did not sue there \*260] within six years, and deny the \*right to sue there at all. Specific allegations in the bill of fraud, showing when they were discovered, are equivalent to a general allegation that they were only discovered within six years.

As to interest. An executor is chargeable with interest on the annual balances kept in his hands, unless they are necessarily kept for the purposes of the estate. *David v. Eden*, 3 Desau. (S. C.), 241; *Benson v. Bruce*, 4 Id., 463; *Walker v. Bynum*, 4 Id., 555; *Jenkins v. Ficklin*, 4 Id., 369; 2 Hill (N. Y.), 561, in note.

*Mr. Sergeant*, for Savage's administrator, replied to *Mr. Berrien*. He commented upon the long time that had elapsed since the final settlement of the estate, upon the cases before referred to in 14 and 15 Peters, and contended that before the complainants below could recover any thing on account of the Kentucky lands, they must establish three propositions;—1st. That Taylor owned the land; 2d. That he devised it; and, 3d. That the executors had power to sell and did sell. Each one of these propositions he denied, and argued upon at great length. The deed to Taylor, he contended, contained a use which was immediately executed and vested the title in the heir of Forbes, who was some person in Germantown. The land must therefore have escheated. 2. Taylor did not devise the land. He might have done so specifically, but did not. 3. The executor had no power to sell. The *Case of Northup*, in 15 Peters, is an exposition of the law upon this subject. The court in Alabama had no jurisdiction over a foreign executor. An executor can neither sue nor be sued in another State.

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Mr. Justice WOODBURY delivered the opinion of the court.

The original proceeding in this case was a bill in equity. The complainants are heirs and devisees of William F. Taylor, being aliens and resident in Scotland. He was a naturalized citizen of South Carolina. The respondent was George M. Savage of Alabama, prosecuted there as executor of Samuel Savage of that State. The claim set up in the bill was, that William F. Taylor, before his death in A. D., 1811, made a will, devising the residue of his estate, after the payment of a few legacies, to the complainants, directing all his property to be first sold and converted into money, and making the said Samuel Savage one of his executors, associated with three others. It was further alleged, that the business was divided between them, and each had settled for what he took in charge, except Savage, who had not accounted fully for the property received by him in South Carolina, or the proceeds of certain lands of William F. Taylor in Kentucky sold by Savage, and that by his negligence large quantities of other lands situated there had been lost.

The original answer denied that the executors took out letters testamentary, except in South Carolina, or assumed any trusts as to \*the property of the testator beyond the limits of that State, or ever proved the will in [\*261 Kentucky. It also denied that any part of William F. Taylor's property in South Carolina had not been duly accounted for. As to lands in Kentucky, it averred that the testator owned none, and, though he set up some title to about 4,400 acres, that it was invalid, and was compromised and released by an agent of the complainants in A. D., 1836. That, as the latter were aliens, the title in the mean time had escheated to the State; the executors having, as alleged, only a bare power to sell, and some of them dying before A. D., 1818, this power could not be exercised by the others. And though it admitted, that Samuel Savage in that year executed deeds of about one fourth of the land claimed by the testator, receiving a small consideration therefor, yet it contended that no title passed thereby, and that no court out of the State of South Carolina had any jurisdiction over the matter. The statute of limitations was also pleaded to all the claims.

Some other particulars, and some amendments of the answer, which may be found material in the progress of the inquiry, will be noticed as occasion shall require.

A preliminary question has been raised in this court, in consequence of what had taken place in the progress of the

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cause, which it may be proper to dispose of first. After judgment had been rendered in the Circuit Court in favor of the complainants for a portion of their claims, and before an appeal was taken, George M. Savage, the executor of Samuel, was removed, and Vincent M. Benham appointed administrator *de bonis non* of Samuel Savage, with the will annexed. The cause was then entered in this court, and attempted to be proceeded in, but was directed to be remitted to the Circuit Court in order first to make Benham a party (1 How., 282, and 2 Id., 395). This having been done, the case came here again, and now it is objected, at the threshold, to any examination of the original questions in the case, that an administrator *de bonis non* is not liable for assets in the hands of the deceased executor. See *Grant v. Chambers*, 4 Mass., 611; *Alsop v. Marrow*, 8 Conn., 584; 1 Serg. & R. (Pa.), 549; 1 Gill & J. (Md.), 207; and other cases cited.

But if the correctness of these decisions be not doubtful at law, they may require several exceptions and limitations in equity. See *Blower v. Massetta*, 3 Atk., 773; 2 Ves. Sr., 465; Mitf. Pl., 64, 78; 2 Vern., 237; *Fletcher's Administrator v. Wise*, 7 Dana (Ky.), 347; 1 How., 284, in this case. And it is clear, that under a statute of Alabama, which must, by the thirty-fourth section of the Judiciary Act, govern this case, the objection cannot be sustained. This statute provides, that "where any suit may have been commenced, on behalf of or against the personal representative or representatives of any testator or intestate, the same may be prosecuted by or against \*262] any person or persons who \*may afterward succeed to the administration or executorship; such person or persons may, at any time, be made parties, on motion, and the cause shall proceed in the same manner, and judgment therein be in all respects as effectual, as if the same were prosecuted by or against the parties originally named." Passed September 4th, 1821. See Clay Dig., 227.

The grounds or causes for relief presented in the bill are next to be examined, and are two. One is the claim on account of an alleged failure by Samuel Savage to settle, as executor in South Carolina, for a debt due from himself to William F. Taylor, and some other debts collected there, with proper interest thereon. This is the first ground on the merits; and it may be better considered separate from the second one, which is the amount demanded for alleged neglects and receipts of money by Savage in relation to the lands situated in Kentucky. The property left by the testator in South Carolina was held in his own right, and the proceeds of it were collected by the executor by virtue of his letters testa-

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mentary. The first objection interposed to the claim respecting that is, that in point of fact nothing is shown to have been due or collected there which the executor did not account for, and finally settle and pay over the balance, April 22d, 1818. Another is, that if any thing collected there and then omitted, or not since paid over, should now be accounted for, it ought to be in the State of South Carolina, where the letters issued, and not in Alabama. Or, at all events, that some action must first be had in South Carolina, and the account re-opened, and the new matters examined and charged there upon Samuel Savage, one of the original executors, before he or George M. Savage, his executor, can be prosecuted elsewhere for the amount. The following cases may be referred to in support of such a position. *Vaughan et al. v. Northup et al.*, 15 Pet., 1; 14 Id., 33; Story, Conf. of L., 513; *Aspden et al. v. Nixon*, 4 How., 467; *Carmichael v. Ray*, 1 Rich. (S. C.), 116. While others may be seen against it in 14 Pet., 116; 15 Id., 119; 2 Wash. C. C., 338.

But it is to be recollected, that the statute of limitations is pleaded against this no less than the other claim; and hence, if, on examination, that statute, or the great length of time which has elapsed since 1818, should be found, under all the circumstances of the case, to render a recovery of any part of this claim illegal or inequitable, a decisive opinion on the other points just mentioned will become unnecessary.

We therefore proceed to inquire into this first.

The settlement in 1818 seems to have been a final one; the balance was paid over to an agent of the plaintiff then present; and the executor, Samuel Savage, soon after left the State, and, for aught which appears, never returned again. The statute, if running at all as to the matters in South Carolina, should, therefore, as a \*general principle, be- gin in 1818; and any special excuse for not suing the [\*263 executor within six years for any thing not then accounted for, such as coverture, minority, or residence abroad, ought in equity as well as law to have been set up in the bill originally (7 Johns. (N. Y.) Ch., 74); or by an amendment of it, allowed after the answer, instead of a special replication, as provided by the 45th rule of this court. See *Marstaller et al. v. M'Clean*, 7 Cranch, 156, and *Miller v. McIntyre*, 6 Pet., 64.

But, notwithstanding this omission, as some doubts exist whether the statute of limitations can technically apply to a claim situated like this, we have looked further,—to the circumstances of laches and long neglect by the complainants, independent of the statute. And they seem to us to operate in equity very conclusively against going back of an

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executor's account, thus formally and finally settled, after the lapse of twenty years and the death of the parties concerned. *Gardner v. Wagner*, 1 Baldw., 394, 454. It must be a very strong case of fraud, proved in such a settlement, or of clear accident or mistake, which could ever make it just, under such circumstances, to reopen and revise it. 9 Leigh (Va.), 393.

Considering, then, that the agent of the complainants, present at the final settlement of the account and receiving the balance, had, for aught which appears, a full opportunity to know all the circumstances, and make objections if he pleased, and that no fraud or mistake is shown in the settlement, whatever error in law may have happened in computing interest, we consider it as a very proper case for length of time to bring repose. In support of this may be seen the following cases. 1 Sch. & L., 428; 2 Id., 309; 10 Wheat., 152; 1 Madd. Ch., 99; 2 Id., 308; *Miller v. McIntyre*, 6 Pet., 66, 67; *Cholmondely v. Clinton*, 2 Jac. & W., 1; 9 Pet., 62; 6 John. (N. Y.) Ch., 266; 7 Id., 90.

The other claim for the money received by Samuel Savage, on account of his conveyance of a portion of the lands situated in Kentucky, and to which William F. Taylor set up an interest, rests on principles entirely different, both as regards the title of Taylor and the responsibility of Savage. It does not seem to have been considered fully, heretofore, that those lands did not belong to William F. Taylor, like the rest of his property in South Carolina, absolutely as his own in fee. They came to him by a deed in trust for others, from Mary Forbes, administratrix of William Forbes, who was uncle of William Forbes Taylor, and a naturalized citizen of Pennsylvania, dying without issue except a son, Nathaniel, who also died without issue after William F. Taylor's death in A. D., 1811, and before September, 1815. The facts in the case do not seem to fix the time with any great certainty. These lands, amounting to about 4,400 acres, had been conveyed to William Forbes in fee, in A. D., 1786, by one Daniel Broadhead, and by Forbes to John Philips in A. D., 1794. \*264] They seem to have remained in Philips's \*hands till June 3d, A. D., 1802, when he conveyed them to the said Mary, the administratrix of William Forbes, with the following limitation in the deed, viz.:—"in trust, nevertheless, to and for the only proper use and behoof of the right heir or heirs of the above-named William Forbes, deceased, in such way and manner as such heir or heirs may order, direct, and appoint."

On the 17th day of September, 1805, she, as before men-



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tioned, conveyed them to William Forbes Taylor, the nephew of her husband, and his only heir or relative naturalized in this country, except the son Nathaniel, the rest being aliens in Scotland, and the son in such health as not likely long to survive. The lands were, therefore, in danger of escheating to the State of Kentucky, or a part of them at least, unless so conveyed as to pass an interest to some person here, which could be held in behalf of those heirs who might reside abroad, so that their shares might not be lost or forfeited. The limitation in the deed to William F. Taylor from Mary Forbes was the same in form as that in the conveyance to her, except the clause creating the trust begins "in witness nevertheless," instead of "in trust nevertheless." Whether this is an error of the press, or in copying, or an intended alteration, is not stated, but it seems not to have been contended in argument, that any different meaning was designed to be attached to the expression. After receiving such a conveyance for such a purpose, it appears that in 1808, William F. Taylor instituted thirty-three suits in ejectment in the State of Kentucky against settlers on these lands, which were pending at his death in A. D., 1811. But, as the actions were in the name of nominal lessees, they did not abate by his death, but continued on the docket till a recovery was had in all of them, in January, 1818.

Prior to this recovery, and subsequent to the death of William F. Taylor in 1811, it does not appear that any of his executors, or any of the heirs of William Forbes, or any of the devisees of William F. Taylor, did any thing respecting these lands, except this. Samuel Savage, in his administration account rendered in December, 1812, charged for a journey to Kentucky in relation to them. And on the 14th of September, 1815, Mary Taylor and her husband gave a power of attorney to Patrick McDowell and Samuel Taylor, to collect her share not only in the estate of William F. Taylor, but in the lands in Kentucky of which she claimed to be one of the heirs, in conjunction with Samuel Taylor, from Nathaniel, the son of William Forbes, and their mother Elizabeth. Samuel Taylor soon after, in 1816, visited this country, and on the 2d of April in that year appointed Adam Hutchinson and Peter Bennock attorneys for himself and sister, not only to collect and receive what was due to them from the estate of William F. Taylor, but to prosecute all actions necessary to recover the real estate in Kentucky belonging to him and his sister. But notwithstanding this, and not \*exactly in keeping with it, on the 26th of [\*265 September, 1817, Samuel Savage, rather than these

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attorneys, writes a letter to Samuel Taylor about the Kentucky lands, as well as the estate of William F. Taylor in South Carolina, then unsettled. And to show the further progress as to these lands after the recoveries in 1818, it does not appear that any of the heirs or their agents took possession of them under the judgments, or did any thing in respect to them till 1837. But, on the contrary, Samuel Savage visited Kentucky in July, 1818, having removed from South Carolina to Tennessee in May previous, and sold about one fourth of the lands to the occupants for \$2,118, calling himself, in the deeds, "surviving executor of the last will and testament of William Taylor," and "authorized" to sell by the will. The other occupants, who did not buy of him, took out soon afterwards injunctions against the judgments recovered, and continued to possess the lands peaceably till William Primrose, an attorney of the complainants, visited Kentucky in 1837 to look after their interests.

The previous special attorneys had not interfered, as Hutchinson, one of them, soon died, and Bennock, the other, declined to act. And Samuel Taylor, in letters to him in 1824 and 1825, inquiring, among other things, if Savage had returned to South Carolina and exhibited any further account of his doings in the ordinary's court, makes no mention of the Kentucky lands.

Primrose, soon ascertaining that in 1818, Savage had sold about eleven hundred acres of them, and the rest had been suffered to remain in the possession of the former occupants, persuaded the latter to give him something more for a release or quitclaim, but a sum, including what had been paid to Savage, not at all equal to their full value.

It is a very important fact, in connection with this arrangement, that Primrose, though at first denying the validity of Savage's doings, was compelled, in order to effect a compromise with the occupants and obtain something more on a settlement, finally to agree, under his hand and seal, in behalf of the plaintiffs, "as far as it is in their power to do so, to ratify and confirm the deed made as aforesaid by the said Savage," but "reserve to themselves the benefit of all claims they may have against the said Savage or his representatives for the consideration which the said Savage received for the sale of the land aforesaid." After executing the releases, he visited Samuel Savage, in Alabama, and demanded of him the money he had received in behalf of the heirs, and indemnity for injuries they had sustained by his alleged neglect in respect to all the lands.

Another material circumstance is very imperfectly stated

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in the record; but it is probably thus. When William F. Taylor died, in 1811, both Nathaniel, the son of William Forbes, and Elizabeth, \*the sister of William Forbes, [\*266 being the mother of Taylor, were aliens.

On these facts, it is next to be decided, whether the interests of the complainants were such in the lands in Kentucky, when Samuel Savage sold a part of them, in 1818, as to make him liable to the complainant for his conduct, wherever he might reside; and, if so, to what extent. It is first manifest, from a part of the statement, that the interest of William F. Taylor, at the time of his death, was only that of a trustee in these lands, and not as the owner of any portion of them in his own right. But still, in that capacity, he had power by his will to direct the sale of them by his executors, and into whose hands the proceeds should afterwards be placed, to be held, of course, for the benefit of the true *cestui que trusts*.

The clause in his will, bearing on the sale, is,—“I do hereby order, will, and direct, that on the first day of January next after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or *may be any wise belonging to me*, be sold.”

This undoubtedly meant to empower the executors to sell the land he held in trust, as well as that in fee, by including any property that may be “any wise belonging to me.” But what interest was thus vested in the executors concerning it? A mere naked power to sell? or a power coupled with a trust? or merely a power coupled with an interest? These are necessary inquiries as to the question made in the case, that these lands have escheated to the State of Kentucky, and also are useful, if not necessary, towards settling the validity of the sale by Savage, and the place where, if liable at all, he can be made to account for the proceeds. To determine these inquiries, it will be necessary to look further into the will.

In that, after directing the payment of a few small legacies out of the proceeds of his property, he proceeds,—“I do hereby order, give, grant, and devise all the remainder or residue of my estate which shall remain after paying the before-mentioned legacies to my dearly beloved brother, Samuel Taylor,” &c., “and to my beloved sister, of the same place, share and share alike, provided they shall be both alive at the time of my decease and have issue, which issue, after their respective deaths, shall share the same equally,” &c. On this and the previous provision in the will, coupled with the facts which have been mentioned, we consider the law to

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be, that William F. Taylor, taking this property by a deed which made it an express trust in his hands for the heirs of William Forbes, held it as trustee for them till his death. He then virtually devised the trust and the lands to the complainants, by directing that the lands be sold, and, after discharging some special legacies, the proceeds be paid over \*267] to the complainants, as his residuary legatees. \*The executors were thus invested with a power to sell, coupled with a trust; and the residuary legatees thus became trustees to the heirs of William Forbes. To identify those heirs is somewhat difficult, but is very important to a true construction of the will. Probably, in 1810, they were his son Nathaniel, who, dying between that period and 1815 without issue, his grandmother, Elizabeth Forbes, succeeded to him; and, on her death about that time, the complainants, her only surviving children, succeeded to her. As all these, except Nathaniel, were aliens, and he was in feeble health in 1811, the paramount intention of the testator doubtless was to prevent an escheat of this and his own property. From consideration of affection; as well as duty, he must have desired to secure both that and his own estate free from escheat in the hands of those near relatives likely soon to be the heirs both of William Forbes and himself.

Either of two constructions of his will would accomplish this object. The one we have just adopted, considering him as devising the proceeds of the lands, and hence their title, to his brother and sister, subject to a power in the executors, coupled with a trust, to sell them, and pay certain legacies; or another, which would consider the power of the executors as one coupled with an interest, and vest the title at once in them for the purpose of selling the lands and discharging the small legacies and debts, if any, but holding the proceeds in trust to be paid over to his brother and sister, for the benefit of the heirs of William Forbes, whomsoever they might then happen to be. See 2 P. Wms., 198; 8 Ves., 437; *Lew. Trusts*, 234; *Peter v. Beverly*, 10 Pet., 533. One of these seems, also, to have been the construction put on the will by Samuel Savage himself, as he proceeded to visit Kentucky twice to discharge his trust in relation to these lands, and finally sold about a fourth of them as surviving executor, which he could not have done honestly, unless deeming himself possessed of more than the naked power which his executor in his answer now sets up. In order to survive to him, it must have been a power coupled either with a trust or an interest. See cases, *post*. To show that the executors, by such a devise, became possessed of a power coupled with a trust at least, reference

may be had to the following cases besides those already cited. 1 Atk., 420, 469; 2 Johns. (N. Y.) Ch., 254; *Clay et al. v. Hart*, 7 Dana (Ky.), 1; Sugd. Powers, 95, 167; 3 Co. Litt., 113, note, 146, 181, *a*; 2 Story, Eq. Jur., § 790; 5 Paige (N. Y.), 318; *Zebach v. Smith*, 3 Binn. (Pa.), 69. One of the tests on this subject is, that a naked power to sell may be exercised or not by the executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust. 7 Dana (Ky.), 1; 10 Pet., 533; 12 Wend. (N. Y.), 554; 2 Story, Eq. Jur., § 1070; 10 Ves., 536.

\*There are some conflicting cases on this subject; [\*268 but it is not necessary to review them again, it having been so ably performed by Thompson, J., for this court in *Peters v. Beverly*, 10 Pet., 565. There, as here, the executors were not expressly named as the persons who were to sell the land, yet, say the court, "it is a power vested in them by necessary implication." See also 2 Sim. & S., 238; 2 Story, Eq. Jur., § 1060; 1 Atk., 420; 15 Johns. (N. Y.), 346; 4 Kent, Com., 326; 2 Johns. (N. Y.) Ch., 254; 4 Hill (N. Y.), 492. There, as here, it was also contended, that if they had the power to sell it was a naked one, and could not survive; but the court say, if they had another duty to perform under the will, with the proceeds, it was a power coupled with a trust or an interest, and survived. 10 Pet., 567; 15 Johns. (N. Y.), 349. And the only difference is, that the subsequent duty to be performed there was the payment of debts, and here it was to pay over the money as legacies, and of course after the payment of any existing debts out of it.

If William F. Taylor, when making his will, supposed that he, as trustee of this land, could direct the proceeds to be paid over to others than the heirs of William or Nathaniel F., the devise would none the less show his intent to pass to the executors a power to sell coupled with a trust; and they would none the less take it coupled with a trust. Indeed, if it was necessary, in a case like this, to carry into effect the leading object of the testator in the will, to consider him as granting to the executors a power coupled with an interest, rather than one coupled with a trust, it would not be difficult to sustain such a construction in a court of equity, as we have before intimated. Courts, in carrying out the wishes of testators, the pole-star in wills, are much inclined, especially in equity, to vest all the power or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it. 4 Kent, Com., 304, 319; 10 Pet., 535; *Schauber v. Jackson*, 2 Wend. (N. Y.), 34; *Bradstreet v. Clarke*,

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12 Id., 663; *Bloomer v. Waldron*, 3 Hill (N. Y.), 365; *Oates v. Cooke*, 3 Burr., 1684; *Jackson v. Martin*, 18 Johns. (N. Y.), 31; 1 Ves. Sr., 485; *Coster v. Lorillard*, 14 Wend. (N. Y.), 299. They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished. *Shelly v. Edlin*, 4 Ad. & E., 585; *White v. Simpson*, 5 East, 164; 1 Barn. & C., 342; 5 Taunt., 385. Though the distinctions between these different powers are not always well preserved, no doubt exists that a power coupled with an interest may be inferred by obvious implication from the whole will, as the fee not being at once vested elsewhere, and it being necessary to have it in the executors to effect the general design (*Jackson v. Schaubert*, 2 Wend. (N. Y.), 1, 54, 55, overruling s. c., 7 Cow. (N. Y.), 193), as well as from the usual course, which is by an express devise to the executors. *Bradstreet v. Clarke*, 12 Wend. (N. Y.), \*665, 667. Nor is it of any consequence how small the interest be. *Osgood v. Franklin*, 2 Johns. (N. Y.) Ch., 20; *Bergen v. Bennett*, 1 Cal. (N. Y.) Cas., 16; 2 P. Wms., 102. It is enough if only to distribute the proceeds as here, or to take the rents or use for the benefit of others. Same cases, and 14 Johns. (N. Y.), 555; *Zebach v. Smith*, 3 Binn. (Pa.), 69. The interest, too, may be equitable or legal. *Hearle v. Greenbank*, 3 Atk., 714; 2 Johns. (N. Y.) Ch., 20. And it is an interest not required to yield a profit or gain, but any title in the estate itself, the thing to be sold. *Hunt v. Rousmanier*, 8 Wheat., 174, 206. Being given by the will, when it is a power coupled with an interest, and the conveyance under it being by and through the will, it is of course for the use of the person designated in the will, as if it was a devise over to him. And if the whole scope and design of the will could not otherwise be accomplished, it might not therefore be unjustifiable in a court of equity, in a case like this, to let the title vest in the executors first, for the purpose of being sold and turned into personal estate, for the alien legatees, in order to avoid the very escheat now set up by the respondent. *Craig v. Leslie*, 3 Wheat., 576, 577; 1 Ves. Sr., 144, 485; 4 Kent, Com., 304, 310, note; 14 Wend. (N. Y.), 268. Indeed, a court of equity, if it should appear necessary, in order to avoid an escheat, and to enforce any apparent devise of the testator when trustee, directing land to be turned into money and to go to certain legatees, or *cestui que trusts*, will look to substance rather than form, will consider the act as done at once, which is directed to be done, and the land as money,

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and thus to be passed to those entitled to it.<sup>1</sup> *Peter v. Beverly*, 10 Pet., 533, 563; 3 Wheat., 563; 5 Paige (N. Y.), 318; *Bogert v. Hertell*, 4 Hill (N. Y.), 495; 2 Story, Eq. Jur., § 790; Newl. Contr., 48 to 64, and authorities cited.

But as the title here can be considered as passing to the complainants at once, leaving only a power coupled with a trust in the executors, and still accomplish the object of the testator in preventing an escheat, we are inclined to adopt that construction of the will as the safer one, amidst several conflicting authorities and opinions in relation to this question. See some of them in 4 Kent, Com., 321, note, 5th ed. In such cases, till the sale is made, the title usually vests in the heirs, if no other intent is manifest. *Jackson v. Burr*, 9 Johns. (N. Y.), 105, 106; *Denn v. Gaskin*, Cowp., 661. But where it is given by devise, as here, and the devisees were not the *cestui que trusts* and heirs as to those lands when he died, it is proper that the title should be considered as passing by devise, and as being in the complainants by devise rather than descent. *Jackson v. Schaubert*, 7 Cow. (N. Y.), 197; Cowp., 661; 8 Wheat., 206, 207; 2 Wend. (N. Y.), 34; *Coster v. Lorillard*, 14 Wend. (N. Y.), 326. And the more especially is it so, when, if the heirs took it as heirs, it might escheat.

The case of *Jackson v. De Lancy*, 13 Johns. (N. Y.), 555, reviews most of the cases connected with this question, and comes to the \*conclusion, substantially, that the title [270 to the trust estate would pass in a case like this to the residuary legatees, and be held by them for the *cestui que trusts*. See the cases there cited, and among them *Braybroke v. Inskip*, 8 Ves., 417; 2 P. Wms., 198; *Ex parte Sergison*, 4 Ves., 147; 1 Meriv., 450; 5 Pick. (Mass.), 112. See also *Dexter v. Stewart*, 7 Johns. (N. Y.) Ch., 55. The better opinion is, that a trust estate always passes in a general devise like this to the residuary legatees, if no circumstances appear to indicate a contrary intent. *Braybroke v. Inskip*, 8 Ves., 417, 486; 3 Id., 348; 4 Id., 147; 13 Johns. (N. Y.), 537; *Ballard et al. v. Carter*, 5 Pick. (Mass.), 115; *Marlow v. Smith*, 2 P. Wms., 198, 201. Here, the circumstances fortify the idea, rather than impair it, that the trust estate was intended, in the end, to pass to the residuary legatees, as they were then probably supposed to be the *cestui que trusts*, and in fact became so before the devise took effect.

Another reason is, that the devisees would, if not *cestui que trusts*, hold the estate for them, and be bound to account for

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<sup>1</sup> FOLLOWED. *Cropley v. Cooper*, 19 Wall., 174.

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it to them, so as to make it safe. *Marlow v. Smith*, 2 P. Wms., 201.

This view of the case disposes first of the point made, that these lands had, before the sale by Savage, escheated to the State of Kentucky. It was hence argued that they could not be sold by him, though no office had been found, the respondent considering an escheat good without any office found. *Montgomery v. Dorion*, 7 N. H., 480; 6 Johns. (N. Y.) Ch., 365. But that is correct only as to land cast by descent on an alien. 7 Cranch, 629. For, as to land taken by devise or purchase, an alien can always hold it till office found. *Knight v. Duplessis*, 2 Ves. Sr., 360; Co. Litt., 2, 6; *Powell Dev.*, 316; *Hubbard v. Goodwin*, 3 Leigh (Va.), 512; 3 Wheat., 589; *Gouverneur's Heirs v. Robertson*, 11 Id., 332, 355; *Fairfax v. Hunter's Lessee*, 7 Cranch, 618.

It will be seen, on a very brief examination, that the idea of a descent cast upon aliens of these lands, on the death of William F. Taylor or Nathaniel Forbes, cannot be sustained under the opinions we have just expressed. The aliens took them by devise, and not by descent, in either of the two constructions of the will which can be at all vindicated. As a general principle, too, in all cases, a court of chancery will not raise a use "by implication," in an alien, so as to endanger the estate, but will rather pass a title to the executors in trust. 2 Wash. C. C., 447. So it has been held that, if it can be avoided, a court will not vest the estate in an alien by construction, in order to have it escheat, when otherwise it would not. 3 Leigh (Va.), 513, and cases cited.

We are prepared next to see whether Samuel Savage or his representatives are liable to account for this property in Alabama, provided he is chargeable anywhere. Because, if not so liable in Alabama, this part of the case must fail for want of jurisdiction in the State in which the proceedings were instituted; and the further questions as to his liability need not be examined.

\*First, then, it happens, that though the heirs of  
 \*271] Nathaniel Forbes and Elizabeth are the same persons here as the residuary legatees of William F. Taylor, yet they take an interest in the Kentucky lands and their proceeds, in a different right and for a different purpose from what they do in the property of William F. Taylor held in his own right. It happens, too, that the interest they thus take is derived from the deed by Mary Forbes to William F. Taylor, and not through the will of the latter, except as directing the trust property to be sold by his executors and paid over to them. It is important to observe also, in this connection, that their



taking of this property and the sale of it are neither of them by virtue of any letters testamentary issued in South Carolina; that the property is not assets of William F. Taylor collected or to be accounted for there; and as the sale made by Samuel Savage of a part of these lands was made in a different State, and of property situated in a different State, and the proceeds of it never carried into South Carolina, and the sale made after he had removed therefrom and closed up his administration there, no reason exists for making him account in that State for the sale. See 1 Rich. (S. C.), 116; 2 Wend. (N. Y.), 471; 6 Pick. (Mass.), 481; 3 Mon. (Ky.), 514; Story, Conf. of L., § 523. So, not having taken out letters testamentary in Kentucky, or even proved the will there, and residing elsewhere, he could not be sued in that State. *Fletcher's Administrator v. Wier*, 7 Dana (Ky.), 348. It follows, then, that if liable at all for the proceeds of the sale of this trust property, being not that owned by the testator in his own right, and the sale made by virtue of a power in the will, and not of letters testamentary, he was liable in Alabama, the State where he had his domicile, the State whither he carried the proceeds,—where the demand was made on him by the complainants, where George M. Savage, his executor, took out letters on his estate, and where alone George M. Savage could be proceeded against for any claim against his testator. *Bryan et al. v. McGee*, 2 Wash. C. C., 338; *Trecothick v. Austin et al.*, 4 Mason, 29.

Being liable, then, in Alabama, if at all, for the acts done in respect to these lands, it is next to be considered whether Samuel Savage or his representatives are responsible for them to the complainants at all, and if so, to what extent. When applied to in 1838, by Primrose, the attorney of the complainants, to pay over the proceeds of his sale, Savage admitted that in 1818 he executed releases of about one fourth of these lands, in which he acknowledged a consideration received by him of more than two thousand dollars; that he professed to make the sale and receive the consideration as surviving executor of William F. Taylor, and by virtue of a power in his will, and that he never had accounted for the proceeds since, but contended that the sum actually realized by him was much smaller than that named in the deeds, and objected to pay over any \*thing, though not assigning particularly his reasons for the refusal. But the coun- [\*272  
sel for the respondent now interpose various specific reasons against accounting for those proceeds beside that already disposed of, which questioned the jurisdiction over the matter in Alabama. One of their objections is the want of interest

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in the complainants as legatees or *cestui que trusts* to recover. Another is the irregularity, and indeed illegality, of his sale. Another is the small amount received, not exceeding his expenses. And another, still, is the statute of limitations.

But we have already shown that the complainants, as residuary legatees, were entitled to the trust estate under the devise immediately, and, in any permissible view, as soon as it was converted into money, and would be bound to manage and account for it to the true *cestui que trusts*, if they were not so themselves. See before, 13 Johns. (N. Y.), 555, and 8 Ves., 417, 436, and other cases. Being now, however, *cestui que trusts* themselves, as well as devisees, their interest in the proceeds of the sale is beyond controversy, there having been, as already shown, no previous escheat of the lands.

In respect to the informality and illegality of the sale, they are insisted on from its not appearing that all the executors except Savage were then dead, from his not recording the will in Kentucky, and from the verbal denial at first of the validity of his sale by Primrose. But it is to be remembered that this is a bill in equity, that the executors had a power under the will to sell this property, which was a power coupled with a trust. That is not a title to be made out at law under a special statute, where much strictness is required. 6 Mass., 40; 14 Id., 286.

Nor is it only a naked power, not coupled with any trust or interest, where much strictness is also requisite. *Williams et al. v. Peyton's Lessee*, 4 Wheat., 79; 10 Pet., 161, and other cases cited. But it is merely a case to show such a sale as may make, in a court of equity, an agent or trustee liable to those for whom he acts. *Minuse v. Cox*, 5 Johns. (N. Y.) Ch., 441, and *Rodriguez v. Hefferman*, Id., 429.

Now it appears that Savage, in his deeds of this land, averred himself to be surviving executor of Taylor's will. And the case discloses the death of two of them, but says nothing of the other, except, in 1824 and 1825, he is referred to as dead "some time ago." Considering him also as then dead, which is the probable inference from these facts, the right of Savage alone to sell under the will would be good. A power to sell, not merely a naked one, but coupled either with an interest or a trust, survives to the surviving executor. *Peter v. Beverly*, 10 Pet., 533; Co. Litt., 113a, 181b; Lew. Trusts, 266; Sugd. Powers, 165, 166; 2 Johns. (N. Y.) Ch., 1; 7 Dana (Ky.), 1; 5 Paige (N. Y.), 46; 2 Story, Eq. Jur., § 1062; 10 Johns. (N. Y.), 562; 8 Wheat., 203; *Jackson v.*

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*Ferris*, 15 Johns. (N. Y.), 346. Several of the States have positive statutes regulating this matter, and usually in this way.

\*Again, if all of several trustees decline the trust except one, the estate vests in him, and he is authorized to sell alone. 3 Paige (N. Y.), 420; 4 Kent, Com., 326, *n*; *King v. Donnelly et al.*, 5 Paige (N. Y.), 46; *In re Van Schoonhoven*, 560; Cro. Eliz., 80; 7 Dana (Ky.), 1; *Zebach v. Smith*, 3 Binn. (Pa.), 69.<sup>1</sup> [\*273]

All the executors in this case, except Savage, declined to have any concern with these lands, and do not appear ever to have done any thing concerning them. It is obvious, likewise, on principle, that where a sale is made under a will, which is merely the evidence of authority or power to do it, the omission to record it will not vitiate the sale, unless recording is in such case required by a local statute. If so required, the statute must of course govern. 9 Wheat., 565; 10 Wheat., 202. Probably the necessity for this must depend entirely on the local laws applicable to the transaction,—the *lex rei sitæ* (2 Hamm. (Ohio), 124; *Kerr v. Moon*, 9 Wheat., 570; 7 Cranch, 115),—and not on any general principles of international law applicable to immovable property. If not necessary by those laws, the omission to do it would not be taken advantage of by any one in any case; and if necessary, it would not seem very equitable to let the executor take advantage of it, who himself had been guilty of the omission.

But however this should be decided, looking to the laws of Kentucky, and how far it may be cured by the subsequent proof and recording of the will by Primrose for the complain-

<sup>1</sup> In case of a voluntary assignment, if one of two trustees decline to act, the trust is not thereby destroyed, but the whole estate vests in the other, and he alone is competent to execute the trust. *Scull v. Reeve*, 2 Gr. (N. J.) Ch., 84; *Crewe v. Dicken*, 4 Ves., 100; *Niclosen v. Wordsworth*, 2 Swanst., 365; *Adams v. Taunton*, 5 Mod., 438. Of course such trustees have a power coupled with an interest, and the rule applies to such. *Hawkins v. May*, 12 Ala., 673; *Franklin v. Osgood*, 14 Johns. (N. Y.), 627; *Parsons v. Boyd*, 20 Ala., 112, 118; *Hannah v. Carrington*, 18 Ark., 85; *Williams v. Otey*, 8 Humph. (Tenn.), 562; *Matter of Stevenson*, 3 Paige (N. Y.), 420; *Robertson v. Gaines*, 2 Humph., 364; *Ellis v. Boston &c. R. R. Co.*, 107 Mass., 18. Upon the death of the last trustee, the estate descends

to the heirs. *Mauldin v. Hewstead*, 14 Ala., p. 708; and if all of them disclaim the trust, the estate vests in the heirs subject to the trust. *Stacey v. Elph.* 1 Myl. & K., 195; *Austin v. Martin*, 29 Beav., 523; *Goss v. Singleton*, 2 Head (Tenn.), 87; *Schenck v. Schenck*, 1 C. E. Gr. (N. J.), 174; *Contra* in New York, *Clark v. Cryo*, 47 Barb., 597; *McCoker v. Brody*, 1 Barb. Ch., 329; *People v. Morton*, 9 N. Y., 176; so in Alabama, *McDougald v. Cary*, 38 Ala., 320; and in Missouri, *Hook v. Dyer*, 47 Mo., 421; but not as to personal property, in New York. *Bucklin v. Bucklin*, 1 N. Y., 242. In the cases cited from Alabama, Missouri, and New York, with respect to real estate, the property vests in the court, upon the death of trustees, which appoints new trustees.

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ants (11 Pet., 211), and whether it is necessary to take out letters testamentary in Kentucky to make such a sale (*Lewis v. McFarland*, 9 Cranch, 151), we need not give any decisive opinion; since this branch of the inquiry, as to the liability of Savage, can be disposed of under a different aspect of the case.

If the land was sold informally by Savage, still it was sold in fact; it was conveyed in the character of surviving executor; the authority for doing it was claimed under the will; the money for it was received in this way; the lands were occupied quietly under his deed for near twenty years; the consideration was never paid back to the grantees, nor by law liable to be, as his deed was without warranty except against those claiming under W. F. Taylor, and, as regards them, was in the end expressly confirmed by his heirs and devisees under the compromise before detailed.

It is true, that their agent at first denied the legality of the sale by Savage, but from its having actually taken place, money been received under it, and the lands occupied in conformity to it so long, he was in the end obliged to compromise and confirm it for much less than the real value of the lands, and expressly reserved the right to resort to Savage for the amount he had received.

On a consideration of these facts, can there be a doubt that it is equitable to make Samuel Savage and his representatives pay over to the *cestui que trusts* the money he thus received \*274] on their account? \*Can they be allowed to set up his own imperfect doings or neglect as a justification for not paying over what he actually received for them, and still holds? Is he not estopped in equity to deny his liability to the complainants? Have they not suffered in their interests to this extent by his conduct? Have not he and his estate profited to this extent by his sale of their property? These questions can be answered only in one way, and the replies must give a stamp and character to the whole transaction in a court of conscience unfavorable to Savage. Consequently, in this bill in equity between the parties as to a trust, we think it manifestly just that the complainants, as against Savage's estate, are entitled to this money; at least, to the amount adjudged in the court below. 1 Johns. (N. Y.) Ch., 620; 1 Paige (N. Y.), 147, 151; 6 Id., 355; 2 Johns. (N. Y.) Ch., 1; 7 Id., 122. Simple interest in such cases seems proper, and was allowed. 4 Ves., 101; 5 Id., 794; 16 Id., 410. As an analogy for estopping Savage to deny what he has said in his own deed, see *Speake et al. v. The United States*, 9 Cranch, 28, and cases in Com. Dig. *Estoppel*, a, 2

So, "it is a settled principle of equity, that when a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit." *Sweet v. Jacocks*, 6 Paige (N. Y.), 365.

So, "every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust." *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch., 110; *Scott v. Surman*, Willes, 404; *Shakeshaft's Case*, 3 Bro. Ch., 198.

He is liable, then, first, on the ground that the *cestui que trusts* might confirm the sale and resort to the proceeds, as they finally did in this case. Story, Eq. Jur., § 1262; 2 Johns. (N. Y.) Ch., 442; 1 Id., 581. It is true that such a confirmation must be full and distinct; whereas here a disavowal of it was at first made by their agent, and when it was in the end agreed to be ratified, the act was done on the receipt of additional money.

This, however, would not seem to vitiate it under the reservation made of a right to proceed against Savage for what he had received. The complainants, then, fully confirmed Savage's acts as a sale, just as much as if no further money had been paid. Though they asked for this additional sum, this was no injury to Savage, and should constitute no objection to his paying over to them what his vendees agreed he should, and what he virtually promised to do, when taking the money for their property.

But if this view of the matter was at all doubtful, another ground exists on which he might be made liable to a like extent, and on which the complainants seek to charge him for a much larger amount. The sale by Savage, if not valid and not confirmed, was \*still injurious to the complainants. [\*275 It gave such a color of title to the tenants, as to prevent the complainants from obtaining any thing more for their lands, but by way of compromise, and then a price in all, including what was paid to Savage, far less than their true value.

A trustee is liable for misconduct or breach of trust or negligence, as well as for money actually received. Jac., 120. And if in these ways he injures the *cestui que trust*, he is liable, whether he himself gains by his misbehaviour or not. Lew. Trusts, 634; 3 Bro. Ch., 198. But when we come to inquire, as the complainants insist, whether Savage was not liable for a much larger sum on this ground than what was

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allowed in the court below, we are met by several difficulties. The amount, beyond the money received and interest thereon, rests on estimates somewhat conjectural after so long a lapse of time; and the neglect itself is not so easily fixed with much certainty, from a like cause, and the death of parties preventing explanations, and an extraordinary omission for almost a whole generation by the complainants themselves to bring this business to a close. Savage, also, may have proceeded no further in subsequent years to sell the rest of the lands, and take charge of the judgments which had been recovered, because discovering that Samuel and Mary Taylor, the heirs, had appointed Hutchinson and Bennock special agents instead of himself to manage the Kentucky property. The degree of neglect to be made out for any sum beyond that actually received is also different and greater. When the trustee is made liable for more, it must be, in the language of the books, "in cases of very supine negligence or wilful default." 14 Johns. (N. Y.), 527; *Id.*, 634; *Pybus v. Smith*, 1 Ves., 193; *Palmer v. Jones*, 1 Vern., 144; *Osgood v. Franklin*, 2 Johns. (N. Y.) Ch., 27; 3 Bro. Ch., 340; 1 Madd., 290; *Caffrey v. Darby*, 6 Ves., 497. It would hardly be justifiable to find the existence of either of those after such a length of time, obscuring so much by its mists and obliterating so much by death.

Damages, likewise, for mere neglect would stand in a different attitude as to the statute of limitations from what we shall soon see it does as to money held in trust; and if the claim was on account of a breach of trust committed and perfected when the neglect first occurred, it would be difficult to overcome the bar occasioned by nineteen or twenty years since.

As to the remaining objection, under this head, that the sum received did not exceed Savage's expenses, this is not in the first answer, and comes from an executor who could not possess full means of knowing the facts, and is not entitled to so much weight as if it had been put in and sworn to by Samuel Savage himself. *Carpenter v. The Providence Ins. Co.*, 4 How., 185, and cases cited there.

Besides this, there is no evidence to support the denial. It is \*not accompanied with any exhibit of expenses; and no account for them seems to have been offered in evidence in the court below. To overcome this denial stands the admission in the first answer of receipts, to the extent of three or four hundred dollars, and no set-off claimed; next, the acknowledgment to Primrose of something received; next, the recorded confession in the deed that \$2,118 was paid to him; and, finally, the testimony of several witnesses to actual pay-

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ments, and the solvency of all the purchasers. But if any doubt existed as to this amount being the proper one, with interest, it would be removed by the proceedings in the District Court, where the account was stated in this manner after an examination by agreement before the judge, and with liberty to except to the account, and no exception taken.

The last objection to the recovery of the amount actually received, with interest thereon, is the statute of limitations. As before intimated, this statute, in respect to money taken in express trust, rests on principles very different from what it might as to damages claimed for a mere neglect of duty, which happened, if at all, near twenty years before any demand or suit. Let it be remembered, that, though this money was received by Savage, as trustee of the plaintiffs, in 1818, yet he never was requested to pay it over till 1837, and that then he first became in default for not accounting for it. Till then he lived remote from the complaints, they being residents in a foreign country, and was not obliged to settle for their money in South Carolina as assets belonging to William F. Taylor, in his own right, as has before been shown.

Retaining it, under all the circumstances, till called on by the complainants or their agent, is therefore by no means decisive evidence of any neglect or intention not to account for it, till the demand made by Primrose, in A. D., 1837. Consequently, the statute in relation to this would not begin to run till then, and hence could have created no bar in September, 1838, when this bill in equity was filed. 1 Jac. & W., 87; *Attorney-General v. Mayor of Exeter*, Jac., 448; 10 Pet., 177; *Michoud v. Girod*, 4 How., 503; *Zeller's Lessee v. Eckert et al.*, Id., 289; 3 Johns. (N. Y.) Ch., 190, 216; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch., 90; *Gist et al. v. Cattell*, 2 Desau. (S. C.), 55. The case of *Trecothick v. Austin*, 4 Mason, 29, was in this, and some other respects, such as to involve and settle principles similar to what have been laid down in this opinion.

The question of fraud and concealment has also been raised at the bar, not only to aid in charging the respondent, but in obviating the operation of the statute of limitations, as it would if existing. 3 Atk., 130; Hardw., 184; 7 Johns. (N. Y.) Ch., 122; 20 Johns. (N. Y.), 576; 6 Wheat., 181. But as it is not necessary to decide on these, we waive an opinion as to imputations, so difficult to settle correctly after the death of most of the parties and the lapse of a quarter of a century.

There are some exceptions as to the form of the claim and of the bill, that deserve a moment's notice before closing.

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\*277] \*Though the plaintiffs make their claim in both cases against Savage, and would be entitled in the end, in one as legatees, if at all, and in the other as *cestui que trusts* rather than legatees; yet the views already expressed would allow them to recover in both cases as residuary legatees, because the trust passes properly to them under the devise, though accompanied by an obligation to account for the property to the *cestui que trusts*, if they should happen to be persons other than themselves.

The description of the complainants, and of their rights, then, in the bill, is not exceptionable; but the description of the liability of Samuel Savage, which is also objected to, is not so free from imperfection. He acted under William F. Taylor's will in a fiduciary capacity in two respects not exactly the same, but not discriminated from each other in the bill. One was, to sell the lands his testator held in Kentucky in trust, and the other, to sell the lands and the other property, held in his own right, in South Carolina. Notwithstanding this, the variance does not seem to us to be such as, in this stage of the cause, and in a court of equity, imperatively to require an amendment.

The claim in both respects is for the acts of Samuel Savage alone, and is to be recovered from his executor alone, and belongs to the complainants alone. The material facts are alleged, upon which it rests in both respects; and hence, as no objection was taken to this in the answer or other pleadings, it may be regarded as cured now, and more especially in a proceeding in chancery, and where there is enough alleged to indicate with distinctness the subject-matter in dispute between the parties. See 32d section of Act of Sept. 24, 1789 (1 Stat. at L., 91); *Garland v. Davis*, 4 How., 131.

It will be seen, that by the course of reasoning we have adopted, and by the points on which our opinions have been formed, it has become unnecessary to decide some other questions presented in this cause in the able arguments of the counsel on both sides. But having decided enough to dispose of the case, and being satisfied that the judgment of the court below was right, however we differ as to some of the reasons assigned in its support, we do not propose to go further into the questions raised, and direct, that in this case the judgment below be affirmed. The other appeal, relating to this matter and argued with it, must consequently be dismissed.

ORDER.

*Vincent M. Benham*, administrator *de bonis non*, with the will annexed, of Samuel Savage, deceased, Appellant, v. *William*



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 Phillips v. Preston.
 

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*Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey.*

This cause came on to be heard on the transcript of the record \*from the District Court of the United States [278 for the Northern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

*William Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey, appellants, v. Vincent M. Benham, administrator de bonis non, with the will annexed, of Samuel Savage, deceased.*

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel. On consideration whereof, this court having affirmed the decree of the said District Court in this cause, on the appeal of the respondents at the present term, it is now here ordered and decreed by this court, that this appeal of the complainants be and the same is hereby dismissed with costs.

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GEORGE W. PHILLIPS, PLAINTIFF IN ERROR, v. JOHN S. PRESTON, DEFENDANT IN ERROR.

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them.

Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error.<sup>1</sup>

Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.<sup>2</sup>

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<sup>1</sup> RELIED ON. *Arthurs v. Hart*, 17 How., 12. See also *Paul v. Rider*, 58 N. H., 121.

<sup>2</sup> Trial by jury is a privilege that may be waived; and when either party has an opportunity to demand it, and

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In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes.

But not where the suit is brought upon a collateral contract.<sup>3</sup>

omits so to do, he cannot complain that it is denied. *Flint River Steamboat Co. v. Foster*, 5 Ga., 194. Where an attorney of the objecting party was present, and made no objection to a reference to a master, and appeared before the master, it was held a waiver. *Houses v. Roth*, 37 Ind., 89; even where the defendant objected to going on with the case, and took no further action, except to watch the progress of the case, and the clerk's entry was, "Neither party requiring a jury, cause submitted to the court," this was held a waiver. *Tower v. Moore*, 52 Mo., 118. Where a statute provided that if the defendant refused to plead, judgment should be pronounced against him, it was held that such a refusal was a waiver. *People v. King*, 28 Cal., 265. If the record shows that the accused "did not demand a jury," it shows a waiver. *Dailey v. State*, 4 Ohio St., 57; and permitting the court to try the case until it makes its finding, is a waiver. *Ellithrope v. Buck*, 17 Ohio St., 72. Where the defendant in a criminal case cannot consent to a trial by a jury of less than twelve jurors, the record must show that there were twelve jurors on the jury. *Jackson v. State*, 6 Blackf. (Ind.), 461; *Maduska v. Thomes*, 6 Kan., 153; *Brown v. State*, 16 Ind., 496; *Brown v. State*, 8 Blackf., 561; *Cancemi v. People*, 18 N. Y., 128; s. c., 7 How. Pr., 271; *Foote v. Lawrence*, 1 Stew. (Ala.), 483; *Larillion v. Lane*, 8 Ark., 372; *State v. Meyell*, 68 Mo., 266.

<sup>3</sup> The general rule is that a general assignee of the effects of an insolvent cannot sue in the Federal courts if his assignors could not have sued in those courts. *Sere v. Pitot*, 6 Cranch, 332. One indorser may sue another indorser of a note in the Federal courts if they are citizens of different States, even though the plaintiff could not have sued the maker there. *Young v. Bryan*, 6 Wheat., 146; but if the suit is against a remote indorser, and the plaintiff traces

his title, in his declaration, though an intermediate indorser, he must show that this intermediate indorser could have sustained his action in that court. 1b. If payable to bearer, a resident of another State may sue on it in the Federal courts. *Bank of Kentucky v. Wister*, 2 Pet., 319; *Bonafee v. Williams*, 3 How., 574; *White v. Vt. &c. R. Co.*, 21 How., 575. Bills of exchange drawn by a citizen of one State on a citizen of another State are deemed foreign bills of exchange, and may be sued upon in such courts. *Buckner v. Finley*, 2 Pet., 586.

So unless the original parties to the note were residents of different States, the assignee of the note cannot sue in the Federal courts. *Gibson v. Chew*, 16 Pet., 315; *Keary v. Farmers' and Merchants' Bank*, Id., 89; *Dromgoole v. Farmers' and Merchants' Bank*, 2 How., 241; *Coffee v. Planters' Bank*, 13 How., 183.

The clause forbidding the assignee of a chose in action from suing when the assignor could not have done so, has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing *in specie*, or damages for its wrongful caption or detention. *Deshler v. Dodge*, 16 How., 622.

Nor does that clause apply, either directly or constructively, to a conveyance of lands from a citizen of one State to a citizen of another State. *Briggs v. State*, 2 Sumn., 252; *McDonald v. Smalley*, 4 Pet., 620. A Pennsylvania coal company sold coal to a citizen of Massachusetts and took a note therefor, payable to T. & Co. "or agent" for the company, or order, and then indorsed it to the plaintiff, a citizen of New York; it was held that the plaintiff could sue in the federal courts. *Heckscher v. Binney*, 3 Woodb. & M., 333. In this case, however, the declaration had money counts as well as a special count on the note; and it was held that no re-

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A contract between two indorsers, that they will divide the loss between them, is a good contract, and founded on a sufficient consideration.<sup>4</sup>

Being a collateral contract, by parol, parol evidence can be given to prove it. The payee is a competent witness, and so is the notary, bringing with him the act of sale.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

\*It was a claim advanced by Preston, the first indorser upon certain promissory notes, that Phillips, [\*279 the second indorser, should pay one half thereof, by virtue of a special agreement between them.

The facts in the case were these.

On the 15th of March, 1836, Sosthain Allain sold to Robert R. Barrow sundry pieces of property in Louisiana, for the sum of \$110,700, payable as follows, viz.:—

1837, March 1,	. . . . .	\$16,921 27
1838, March 1,	. . . . .	18,028 26
1839, March 1,	. . . . .	19,135 25

covery could be had on the special count, unless it was averred that the money was payable to T. & Co. or the agents of the coal company.

The holder of a coupon payable to bearer is not an assignee of the cause of action within the meaning of the first section of the Act of March 3, 1875. *Cooper v. Town of Thompson*, 13 Blatchf., 435; *Codman v. Vermont & Canada R. R. Co.*, 16 Id., 165; *Same v. Same*, 17 Id., 1; *Pettit v. Town of Hope*, 18 Id., 180.

The assignee of a right to an account of the proceeds of sales of mortgaged property cannot maintain a suit in the Circuit Court of the United States in a case where his assignors were not competent, on the ground of citizenship, to sue the defendants. *Wilkinson v. Wilkinson*, 2 Curt., 582. A suit to recover damages from a corporation for its breach of an implied contract, in neglecting to protest and give notice in regard to certain drafts forwarded to it by a correspondent bank, may be maintained by the assignee of the right of action, if of another State. *Barney v. Globe Bank*, 5 Blatchf., 107.

The assignee of a mortgage cannot maintain a foreclosure of the suit if his assignor could not have done so.

*Sheldon v. Sill*, 8 How., 441. *Contra, Dundar v. Bowler*, 3 McLean, 204; *Brainard v. Williams*, 4 Id., 122. As to suit by an indorser against an indorsee, see *Campbell v. Jordan*, Hempst., 534.

<sup>4</sup> Contribution between successive indorsers for the accommodation of another party does not arise by operation of law, but only by special agreement. *Hogue v. Davis*, 8 Gratt. (Va.), 4; *Farmers' Bank v. Vannmeter*, 4 Rand. (Va.), 553; *Bank of United States v. Beirne*, 1 Gratt. (Va.), p. 265; *Chalmers v. McMurdo*, 5 Munf. (Va.), 552; *McCarty v. Roots*, 21 How., 432; *McDonald v. Magruder*, 3 Pet., 470; *Key v. Simpson*, 22 How., 350; *Weston v. Chamberlain*, 7 Cush. (Mass.), 404; *Clapp v. Rice*, 13 Gray (Mass.), 403; *Sweet v. McAlister*, 4 Allen (Mass.), 355; *Gore v. Wilson*, 40 Ind., 206; *Davis v. Morgan*, 64 N. C., 578; *Eastervly v. Barber*, 66 N. Y., 433; *Kirkner v. Conklin*, 40 Conn., 81; *Smith v. Merrill*, 54 Me., 48; *Coolidge v. Wiggin*, 62 Me., 598; *McCune v. Belt*, 46 Mo., 174. In *Johnson v. Ramsey*, 14 Vr. (N. J.), 42, it was held that an agreement to vary the terms of the contract, as it is raised by the presumption of law, could not be proven unless in writing.

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1840, March 1, . . . . .	\$20,242 20
1841, March 1, . . . . .	21,349 23
1842, March 1, . . . . .	22,456 22
1843, March 1, . . . . .	23,563 21

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For the security of the notes given for the above payments, the property was mortgaged.

On the 17th of March, 1837, Barrow sold the above property (with a slight addition) to Samuel John Carr, for \$141,695.68, payable as follows:—

Cash, . . . . .	\$16,921 27
1838, March 1, . . . . .	18,028 26
1839, March 1, . . . . .	19,135 25
1840, March 1, . . . . .	20,242 24
1841, March 1, . . . . .	21,349 23
1842, March 1, . . . . .	22,456 22
1843, March 1, . . . . .	23,563 21
	<hr/>
	\$141,695 68

The act of sale, which was signed by Barrow and Carr, and executed before Louis T. Caire, a notary public, contained, amongst other things, the following provisions, viz.:—

1. After reciting the cash payment, it proceeded thus:—  
 “And in payment of the balance, the said purchaser handed over to me, the undersigned notary, six promissory notes, bearing even date herewith, subscribed by him, to the order [of] John S. Preston, indorsed by him, the said John S. Preston, domiciliated in the parish of Ascension, as first indorser, and by George W. Phillips, domiciliated in the parish of Assumption, as second indorser, it being understood that, although each of the indorsers is responsible for the whole amount of said notes, they are between themselves equally responsible; said notes have been made payable at the domicile of the Union Bank of Louisiana, and their amount and terms of payment are as follows, viz.” (then followed an enumeration of the notes as above).

2. An agreement that the property should stand mortgaged.

3. An agreement that the last-mentioned notes should be substituted, if possible, for those given by Barrow to Allain, and if it \*should not be possible to do so, then that  
 \*280] payments made upon the last set of notes should be applied to the first set, as they became due.

The notes given by Carr to Barrow were indorsed by John S. Preston, as the first indorser, and by George W. Phillips, as the second indorser.

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On the 1st of March, 1838, the first note became due, and was not paid by Carr. But it appeared by the record not to have been protested until the 30th of March, 1839.

On the 1st of March, 1839, another note became due, which appears to have been protested in proper time.

On the 5th of April, 1839, Barrow filed a petition in the District Court of the Fourth Judicial District of the State of Louisiana (a State court), representing the above-mentioned facts, and stating further, that he had made the necessary payments and arrangements with Allain, respecting the notes due in 1837, 1838, 1839, and praying for a sale of the property.

On the 1st of March, 1840, another note fell due, which was not paid, and was protested.

On the 15th of August, 1840, the property was sold in block by the sheriff to Isaac T. Preston, for his brother, John S. Preston, for the sum of \$67,500, the purchaser assuming the payment of the notes due in 1841, 1842, and 1843.

On the 20th of August, 1840, the sheriff executed a deed for the property to John S. Preston.

On the 17th of February, 1841, Preston, calling himself a citizen of South Carolina, filed a petition in the Circuit Court of the United States against Phillips, a citizen of Louisiana, alleging that, by virtue of the agreement between them, Phillips was bound to pay to him the one half of all that he had paid, being \$28,702.87, with legal interest on \$9,014.13 from the 4th day of March, 1838, and like interest on \$9,567.62½ from the 4th day of March, 1839. And on \$10,121, from the 4th day of March, 1840, with half the costs of protests.

On the 26th of February, 1841, the counsel of Phillips filed an exception, being a plea to the jurisdiction of the court, upon the ground that Barrow was the assignor of the notes to Preston, and that Barrow, being a citizen of the same State with Phillips, was incapable of suing him in the United States court.

On the 20th of April, 1841, the court overruled this exception, and Phillips filed an answer, denying "all and singular the allegations contained in the plaintiff's petition, and particularly that he ever promised or undertook to be responsible on the notes described in said petition, in any other capacity except as second indorser and after and in default of the plaintiff, or that the said notes ever were duly protested, and notice given to this defendant."

In April, 1841, the cause came up for hearing. On the trial the following testimony was filed.

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\*281] *\*Testimony taken by Consent, this April 23d, 1841.*

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The testimony of Robert R. Barrow, a witness for the plaintiff, who, being duly sworn, deposeth and saith, being asked by the plaintiff what he knows in relation to an agreement between John S. Preston and George W. Phillips, in relation to their indorsement of certain notes given by Samuel J. Carr to him, on payment of a plantation and slaves in Point Coupee, purchased from him by said Carr, about the 17th of March, 1837.

(The counsel of the defendant, Seth Barton, Esq., objecting to the above question, and reserving all legal exceptions.)

The witness says, that he was present at the time the notes were signed, about the 17th March, 1837. Samuel J. Carr, the plaintiff, and defendant, with deponent, met by appointment at the time of the sale, at Caire's office, before whom the act was passed; the act was already prepared when the aforesaid parties met, it having been prepared by the notary, under the directions of witness and said Carr; the notes were also drawn up and ready to be signed, under Carr and witness's directions and instructions; the notes were then handed to the plaintiff to indorse; when about to sign, Mr. Preston observed that he thought those notes were to have been drawn to the order of Phillips, the defendant. Mr. Carr replied, that he did not know that it would make any difference. And thereupon Colonel Preston turned round, and, addressing himself to Colonel Phillips, the defendant, said he supposed it made no difference, and said he wished it particularly understood between them, that in case Carr should fail to pay the notes, and the indorsers compelled to pay them, that he (Phillips) and Preston should be equally bound, and share alike in the loss, and that he, Preston, wished it so stated in the act. After this conversation, Colonel Preston turned to Mr. Caire, the notary, and remarked, that he wished it noted in the act, that the indorsers should be bound alike on failure of Carr. The notary then put down on paper the exact words that Colonel Preston dictated; all the parties were near each other, and participating more or less in the conversation. After this, Colonel Preston and Colonel Phillips indorsed the notes and handed them over to the notary; Colonel Preston indorsed first, and Colonel Phillips next; and instructions were given to the notary, Caire, to draw up a new act, inserting the clause aforesaid, as regards the equal liability of the indorsers; and then,

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to indentify the notes with the act, the clause was added in the new act, and witness, when his attention was called to it by Mr. Caire, objected to its insertion, because, as he then thought, it made the indorsers liable to him for only their half. Mr. Caire called upon an attorney at law, whose name witness does not remember, to explain it, and thereupon witness was satisfied that it did not affect him, but only [\*282 \*related to the respective liabilities of the indorsers. The act was not signed at the time the notes were given, but was signed at a different time on that day, or the day next, but he cannot remember. Witness recollects the conversation very distinctly, as it was impressed on his mind at the time, and has frequently thought of it since.

Being shown the copy of the act annexed to the petition, and the clause at the top of the page, says, they are the same referred to by him. The three notes marked A, B, and C, filed with this deposition, are part of the consideration of the sale; Colonel Preston took up three of the notes, A, B, and C, and paid them after protest, interest and all charges, which payment was made before this suit was instituted. The tract of land in West Feliciana, mortgaged to secure the payment of these notes, was seized and sold to pay prior mortgages of said Carr, and consequently there was nothing to come from that land to pay this debt of Carr's, for the plantation sold as aforesaid; this tract was woodland; Colonel Preston has paid the notes which have matured, and has assumed the balance due, he having purchased in the property mortgaged, to secure the payment of the notes aforesaid.

The defendant, by S. Barton, his attorney, objects to the whole of the foregoing deposition of the witness, as illegal and incompetent; and specially to all such parts of it as are hearsay or secondary proof; and specially, also, to all such parts of it as go to vary, or contradict, or explain the written testimony to which the witness refers; and particularly such parts as tend to prove any thing against or beyond the authentic act of sale, on file in this cause, and insisting on such objections (to be urged on trial), and waiving no part thereof, cross-examines the witness, under the above reservations.

Witness never had the act of sale referred to recorded in West Feliciana; that the property in Feliciana was sold for judgments of younger date than the sale aforesaid; the first note of \$18,000 was paid by a renewal of note payable to the Union Bank; the other two were paid by drafts; the note given on renewal was not indorsed by Colonel Phillips; Colonel Phillips was no party to the drafts referred to; the drafts were on time and suited witness; witness thought

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from appearances that Preston and Phillips were just introduced to each other, or not long acquainted, when they met at the notary's, as above related; some short time before the act was passed, witness met Colonel Phillips at the theatre, and had some conversation about his indorsing for Carr; said he, Phillips, had promised to indorse for Carr, but Carr said it would only be temporarily, as he had made arrangements to change the indorsements, by substituting Colonel Isaac T. Preston in the place; witness thinks that Colonel Phillips must have heard the conversation related to above, as \*283] it took place at the notary's; does not recollect \*that Phillips made any reply to Colonel Preston; Phillips must have heard it, as the conversation was made direct by Preston to him; and Phillips must have heard the direction of Preston to the notary, to insert the clause; thinks they met at the notary's at ten or eleven in the morning; neither the plaintiff or defendant attended at any other time at the notary's than that mentioned, nor were they present when he and Carr executed the act, nor can he say that Phillips has seen the act; there was no arrangement between him and Preston, in relation to the sale of the property. It is admitted, that the property was purchased by Colonel Preston, plaintiff, for \$67,500; that the third note was paid by draft prior to the sale under the seizure and sale; the three last notes assumed by Preston are in the hands of witness; witness has never had the mortgage raised, to secure the last three notes.

(Signed,)

R. R. BARROW.

Sworn to and subscribed before me, this 23d April, 1841.

DUNCAN N. HENNEN, *Clerk*.

Upon the trial, the counsel for Phillips, the defendant, filed the following bill of exceptions:—

1st. The defendant, by his attorney, offered to file document A as his peremptory exceptions founded in law; to the filing whereof the plaintiff's counsel objected, and their objection was sustained by the court; to which decision the defendant excepts.

This document was offered after the pleadings were read:

2d. Before any evidence was offered by either of the parties in support of the several issues, on their respective parts to be maintained, the defendant's counsel moved the court that the clerk be directed to take down the testimony of all the witnesses whom either party should adduce on the trial, and to file all documentary proof received in evidence, and keep minutes thereof; but the court overruled the motion, and



witnesses were examined without their testimony being taken down, and documentary proof received without being marked as filed, or minutes taken thereof; to which decision the defendant excepts.

3d. The plaintiff offered in evidence the deposition of Robert R. Barrow, marked B, to the reception whereof the defendant objected; but the objection was overruled by the court, and the deposition was admitted in evidence; to which decision of the court the defendant excepts.

4th. The plaintiff offered in evidence the first, second, and third of the promissory notes described in the petition, together with the protests thereof, and the several certificates of the notary in relation to the manner and times in which he notified the plaintiff and defendant of the dishonor of the notes as they respectively matured. Whereupon the defendant objected to the admission of the said certificates, or any proof adduced for the purpose of, and leaving notice to the indorsers of, protest, as no such notices were alleged \*in the petition; the court overruled the objection, [\*284 and admitted the evidence; and to its decision therein the defendant excepts.

5th. The plaintiff offered Louis T. Caire (the notary before whom the act of sale was passed that is described in the petition) as a witness to prove the allegations of the petition, and a verbal agreement between the plaintiff and the defendant, made before the passing of the act of sale, that, as between themselves, they would be equally liable as indorsers, as stated in the petition. And, also, to prove by him that the clause in the act of sale, setting forth said agreement, was inserted therein by the instruction of the plaintiff, in the presence of the defendant, and without any objection thereto on his part. Whereupon the defendant objected to the admission of such evidence; but the court overruled the objection, and admitted the evidence; and to its decision therein the defendant excepts.

6th. The plaintiff offered in evidence the copy of the act of sale described in the petition, and marked (C), to the admission of which, and such parts thereof as were adduced for the purpose, and tended to prove any agreement between the plaintiff and the defendant, as to their equal liability between themselves, upon their several indorsements upon the promissory notes described in the petition, and to charge the defendant with any liability resulting therefrom, the defendant objected; but the court overruled the objection, and admitted the evidence; and to such, its decision, the defendant excepts.

7th. The plaintiff offered in evidence the record of the suit

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of *Robert R. Barrow v. S. John Carr*, being the order of seizure and sale, and proceedings therein, relating to the seizure and sale of such of the property described in the petition and act of sale, as was situated and located in the parish of Point Coupee, Louisiana. The said record is marked (D), to the admission of which record and proceedings the defendant objected, but the objection was overruled by the court; and to such, its decision, the defendant excepts.

8th. The plaintiff offered in evidence document marked (D), purporting to be an act of sale from the sheriff of Point Coupee, adjudicating the property last mentioned to the plaintiff, as the purchaser at public sale; to the admission whereof the defendant objected, but the court overruled the objection; to which decision of the court the defendant excepts.

The defendant, by his attorney, having reserved the foregoing several exceptions, as the occasions thereof severally arose in the course of the trial, and at the suggestion of the court, the drafting of separate bills of exceptions were dispensed with, and the general bill for the whole postponed, till the plaintiff's testimony was closed.

He now respectfully presents to the court this his bill of exceptions, embracing all the several points reserved, and prays the court to sign and seal the same, which is done accordingly.

(Signed,)

J. MCKINLEY, [SEAL.]  
P. K. LAWRENCE. [SEAL.]

April 28th, 1841.

\*285] \*Peremptory exceptions referred to in bill of exceptions, marked as filed, same day.

*United States of America :—Circuit Court of the United States, being the Ninth Circuit thereof, and holden at New Orleans, in and for the Eastern District of Louisiana.*

*John S. Preston v. George W. Phillips. April term, 1841.*

And now at said term came the defendant, George W. Phillips, by his attorney, and (not waiving, but insisting on his answer heretofore filed in this cause), availing himself of the provisions of the Louisiana code of practice in that behalf, and as the same has been adopted by this honorable court, he here presents his peremptory exceptions, founded in law, to the further maintenance of this suit.

And for causes of peremptory exception, he sets forth and assigns the following, to wit:—

1st. The agreement stated in the petition to have been en-

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tered into by the plaintiff and defendant is nowhere alleged to have been in writing, or signed by the parties, or embodied in any instrument of writing to which they were parties, or to which they, or either of them, assented, by their presence or otherwise, at the time of the execution of any such instrument of writing, by those who may have been parties thereto.

2d. The petition in no part alleges any, or a sufficient, consideration for the said supposed agreement, nor does it allege or show, that the said agreement imported in itself any, or a sufficient, consideration.

3d. The said supposed agreement is at variance with, and in contradiction of, and seeks to change, the liabilities and relations of the plaintiff and defendant to each other, in relation to certain contracts in writing, to which the petition alleges they are parties, by respectively signing their names on the backs of six several promissory notes, as first and second indorsers thereof.

4th. The petition, in no part of it, alleges that either the plaintiff or the defendant was duly notified of the dishonor of any of the said promissory notes, which it alleges to have been protested for non-payment, as they severally matured, nor does the petition show in what manner the plaintiff was, or could have been, coerced to make the several payments he alleges he has made.

5th. All the statements and allegations of the petitions in reference to any agreement or circumstance, out of which any liability of the defendant to the plaintiff is supposed to arise, are loose, vague, and indefinite, and insufficient in law to put the parties to their proofs upon the several issues of fact which the pleadings present.

Wherefore, and for divers other good reasons in this behalf, the defendant prays judgment of this honorable court upon the said \*petition, and the dismissal thereof, [\*286 with a further judgment for costs in this behalf most unjustly sustained.

(Signed,)

JANIN & BARTON,  
*Defendant's attorneys.*

And afterwards, to wit, on the 29th day of April, 1841, the following motion in arrest of judgment was filed.

*United States of America:—Circuit Court of the United States, holden at New Orleans, in and for the Eastern District of Louisiana.*

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*John S. Preston v. George W. Phillips. April term, 1841.*

And now comes the defendant, by his attorney, and prays the court to arrest the judgment in this case, and sets forth and assigns as grounds for the motion :—

1st. That the plaintiff's petition does not allege that the agreement described therein, and out of which the defendant's liability is supposed to arise, was signed by either plaintiff or defendant, or that the same was in writing.

2d. The petition does not allege any, or a sufficient, consideration for the agreement which it states to have been entered into by the defendant, to and with the plaintiff.

3d. The agreement stated in the petition is at variance with, and in contradiction of, the contract of indorsements, which arises from the signatures of plaintiff and defendant as first and second indorsers, upon several promissory notes, which the petition alleges they signed as such.

4th. There is no allegation in the petition of notice or notices being given, either to plaintiff or defendant, of the dishonor or protest of any one of the said promissory notes, as they respectively matured.

5th. The evidence adduced at the trial, as shown by the statement of facts, and the several documentary proofs to which it makes reference, is not sufficient in law to support the issues on the plaintiff's behalf to be maintained, or to authorize any judgment in favor of the plaintiff, and against the defendant.

6th. A trial of this cause by the court, and without the intervention of a jury, unless there had been an express waiver of record, is not authorized by the law regulating the practice of this court.

Wherefore, the defendant prays that the judgment be arrested, that the plaintiff take nothing by his plaint, that his petition be dismissed, and that the defendant may go hence without day, and recover of the plaintiff his costs in this behalf most wrongfully sustained.

(Signed,) S. BARTON, *Defendant's attorney.*

On the 29th of April, 1841, the court entered up judgment in favor of the plaintiff, John S. Preston, and against the defendant, \*George W. Phillips, for the sum of \$19,688.74, with interest of five per centum per annum upon \$9,567.62 thereof, from the 4th day of March, 1839; and upon \$10,121.12, from the 4th day of March, 1840, till paid; for \$5.25, cost of protest, and cost of this suit.

This judgment was for one half of the note due March 1, 1839, and one half of the note due March 1, 1840, viz.:

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Amount of judgment, . . . . .	\$19,688 74
Note due 1-4th March, 1839, \$19,135 25	
One half of which is . . . . .	9,567 62
Note due 1-4th March, 1840, \$20,242 24	
One half of which is . . . . .	10,121 12
	<hr/> \$19,688 74

The defendant's counsel moved an arrest of judgment, upon the grounds just stated, which motion was overruled.

To review all these opinions of the court, the case was brought up to this court.

The cause was argued by *Mr. Barton* for the plaintiff in error, who contended, that if Preston obtained the notes from Barrow by substitution, then the plea to the jurisdiction of the court must be sustained, because Barrow and the original defendant, Phillips, were both citizens of Louisiana. 4 Dall., 8, 10, 11.

Until payment of the note, there is no claim against the present indorser. 4 Cranch, 46.

By the law of Louisiana, peremptory exceptions are taken to matters of fact or matters of law, by way of demurrer. Code of Practice, art. 343-346.

The court was wrong in refusing them. Act of 1824; 4 Stat. at L., 62.

An appellate court may admit the exceptions, and go on to decide the case. Code of Practice, 902; 1 La. R., 315; 4 Mart. (La.) N. S., 437.

Barrow did not record the deed, and therefore a younger judgment came in. It was sold when three notes only were paid. When Preston got it, there was nothing due upon it.

Parol evidence cannot be introduced to vary a written contract. Civil Code, 2256; 1 Mart. (La.) N. S., 641.

The first indorser is always supposed to assign to the second for a valuable consideration. Mart., 2 N. S., 361, 367; 3 Id., 692; 5 Id., 3; 2 La. R., 48, 447, 448; 3 Id., 692; 4 Id., 469; 6 Mart. (La.) N. S., 517.

In order to be bound by an act before a notary, the party concerned must sign. 11 Mart. (La.), 453.

The first indorser is liable, and must pay notwithstanding the existence of an understanding. 4 Wheat., 174; 1 Pet. C. C., 85; 6 Pet., 59.

\*Preston took renewed notes, and thereby extinguished Phillips's liability. For the doctrine of novation, see New Civil Code, art. 2181, 2187, 2194; 2 Mart. [\*288

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(La.) N. S., 144; 1 La., 527; 4 Id., 511, 512; 1 Rob. (La.), 302, 303; Code of Practice, 642, 680, 732, 745.

Mr. Justice WOODBURY delivered the opinion of the court.

The points which have been argued in this case are in part connected with matters of form, and in part with what is substance. We shall dispose of the first, before proceeding to examine the last.

The principal objection in respect to form is, that the court below refused to receive what are called in the practice of the State of Louisiana "*peremptory exceptions*." These are of two kinds, one as to form, and one as to law. Those in this case were offered as "*peremptory exceptions, founded in law*." By the Code of Practice in Louisiana, art. 345, such exceptions "*may be pleaded in every stage of the action previous to the definite judgment*." 1 La., 315; 1 Mart. (La.) N. S., 437.

Hence, though offered here after the pleadings were read, they are admissible, while peremptory exceptions relating to *form* would not be then admissible. See art. 344. The only doubt as to their being duly offered arises from the provision in the 346th article, which requires them to "*be pleaded specially*," and they are not here in the precise form of a special plea at common law. But, in the absence of any adjudged cases to the contrary, we are inclined to think, that, under the liberal and general pleading in use in Louisiana, these exceptions must be considered as "*specially pleaded*," when set forth as they were here in writing, and in a specific or detailed form, and judgment prayed on them in favor of the present plaintiff. Has he then been deprived of the advantage attached to them? That is the important inquiry. On examination of the record it will be seen, that he had the benefit of all these exceptions, first in a motion in arrest of judgment.

Again, he had the benefit of all the important matter in those exceptions by the bill which was afterwards filed and allowed, and upon which this writ of error has been brought. We cannot, therefore, perceive that he has suffered any by the refusal of the court to receive these peremptory exceptions when first offered.

The case in this respect is like one at common law, where the defendant should propose to demur generally to the declaration, but, being refused, objects to the sufficiency of it to cover various portions of the evidence as it is offered, and also objects to the sufficiency of the declaration in arrest of

judgment. He thus, by a subsequent bill of exceptions to the rulings on the testimony and on the sufficiency of the declaration, obtains every advantage that he could have had under his general demurrer, and thus suffers nothing which requires a reversal of the judgment and a new trial for his relief.

\*The next objection of a formal character is, that the court below refused, though requested by the [\*289 original defendant, to have the clerk take down in writing and file the testimony of the witnesses and the documentary evidence.

It is true, that by a statute of Louisiana, passed July 20th, 1817, their courts are directed to have the testimony taken down "in all cases where an appeal lies to the Supreme Court, if either party require it." It is also true, that an act of Congress, passed May 26th, 1824 (4 Stat. at L., 63), has made the practice existing in Louisiana the guide to that in the courts of the United States, when sitting in that State, except as it may be modified by rules of the judge of the United States court.

And it is further shown in this record, that the district judge there, November 20th, 1837, adopted the practice of Louisiana, as then existing, in all cases not of admiralty jurisdiction.

In a cause once decided by this court, which was connected with this point, *Wilcox et al. v. Hunt*, 13 Pet., 378, it was remarked, that the plea put in there as a part of the State practice, as the latter had not been adopted, was not received. But the practice there standing differently from that which is urged in this case, that decision does not control the present one.

In considering, then, the propriety of the ruling of the court here, it is first to be noticed, that, by the words of the statute, this testimony is to be taken down and filed only in those cases "where an appeal lies." That means, of course, a *technical* appeal, where the facts are to be reviewed and reconsidered, for in such an one only is there any use in taking them down. But in the present case no appeal of that character lay to this court, but merely a writ of error to bring the law and not the facts here for reëxamination. To construe the act of 1824 as if meaning to devolve on this court such a reëxamination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give to it an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. *Parsons v. Bedford et al.*, 3 Pet., 448.

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In a case of chancery or admiralty jurisdiction it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. *Livingston v. Story*, 9 Pet., 632; *McCullum v. Eager*, 2 How., 64.

In this case, likewise, it would be totally useless to have all the facts taken down in that manner, because, if so taken and sent up here, it would be irrelevant and improperly burdening the record, as much as the whole charge and opinion of the judge, instead of the naked points excepted to. See 28th rule of this court, and *Zeller's Lessee v. Eckert et al.*, 4 How., 297, 298. If a case comes up in that manner, this court never reconsiders or reexamines all the facts, but merely the \*290] law arising on them, as if a bill of exceptions \*had been properly filed. This has been decided already in *Parsons v. Armor et al.*, 3 Pet., 425; *Minor v. Tillotson*, 2 How., 394.

Besides these considerations, showing that neither the words of the statute, nor the reasons for it, reach a case like this, there is another in the practice and laws of Louisiana, which shows that this provision does not extend to a cause like the present in this court. There the court of appeal, even in cases at law, often decides on all the facts as well as the law; but not so here. The court there may be substituted for a jury by consent of the parties in a trial at law, and were in this case below. But no such power can be conferred on this Supreme Court by parties in cases at law; and, as before shown, it exists under acts of Congress merely in cases in equity and admiralty.

To conclude on this point, then, it will be seen that the plaintiff in error, notwithstanding the refusal to have the clerk take down this evidence, has enjoyed all the benefit of it under his bill of exceptions, where it was material and he wished to raise any question of law on it, and has enjoyed it as fully as if the whole had been taken down and filed. And thus he loses nothing and suffers nothing by the court refusing to do what we think neither the language nor spirit of the law requires in a case like this. *Parsons v. Bedford*, 3 Pet., 433.

There are two other objections of form, which appear on the record and may well be noticed, though they are not embodied in the bill of exceptions. One is as to the waiver of a trial by jury in this case in the court below. After a hearing there, it was urged, that, the waiver not having been entered on the record, the court was not authorized to proceed without a jury.



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But it would hardly be permissible for a party to proceed without objection in a trial of facts before the court, in a case at law in a State where the statutes permitted it, and the habits of the people under the civil law inclined them to favor it, and then, after a decision might be announced which was not satisfactory, to offer such an objection as this. From its not being incorporated into the bill of exceptions, or argued at the hearing before us, a strong presumption arises that it has been abandoned.<sup>1</sup>

The other objection is spread upon the early part of the record, and was a proper one for the consideration of the court in that stage of the case, as it went to its jurisdiction. This was urged on the ground, that the notes mentioned in the petition of the plaintiff below belonged or ran originally to R. Barrow, a resident of Louisiana, in the same State with the defendant, and that his title was assigned to the plaintiff, and thus the latter cannot sue the defendant in this court, if Barrow could not. This position would be well taken under the provision in the 11th section of the Judiciary Act of 1789, if the original plaintiff had instituted his suit upon the notes as assignee of them. See *Towne v. Smith*, 1 Woodb. & M., 115; *Bean v. Smith et al.*, 2 Mason, 252; 16 Pet., 315; *Stanley v. Bank of North America*, 4 Dall., 8-11; *Montalet v. Murray*, 4 Cranch, 46. But so far from that, he does not declare at all on the notes. He sets out a separate and different contract as his ground for recovery, resting on an original agreement between him and the defendant; and does not set out any assignment of those notes to himself by Barrow. Even if he counted on the notes, but not on or through an assignment of them, this court would have jurisdiction. 6 Wheat., 146; 9 Id., 537; 2 Pet., 326; 11 Id., 801; 3 How., 576, 577; 1 Mason, 251; 1 McLean, 132. The judge below, then, properly overruled this objection.

We come next to the only remaining question in this case, which branches into five or six different exceptions. It is a question of substance, and in some respects is not without difficulty. It is whether the ground upon which the objection going to the jurisdiction was overruled is well founded in the declaration and the facts, by showing a separate and independent contract, and one which had a good consideration in law.

On looking to the petition, it will be seen that it sets out a sale of land between other parties; the mode of payment

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<sup>1</sup> FOLLOWED. *United States v. King*, 8 C. Tel. Co., 1 Otto, 614. See *Kearney v. Case*, 12 Wall., 282. 7 How., 886. CITED. *Barreda v. Silsbee*, 21 How., 107; *Gilman v. Illinois*

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stipulated; the agreement between the plaintiff and defendant to become indorsers of certain notes, and divide between them any loss; the subsequent failure of the purchaser to pay the notes; the settlement of them by the plaintiff, and his right under the agreement and facts to recover of the defendant one half of the amount. The whole claim proceeds on the collateral agreement, and there is no pretence of grounding the suit, as holder or indorsee, on any promises contained in the notes, or in the indorsements on them.

There is also a good consideration for this collateral agreement. It is the promise of the plaintiff beforehand to loose one half, if the defendant would become a surety with him and loose the other half, and the actual payment afterwards of the whole by the plaintiff. Being then a collateral agreement by parol, which is sued, it stands free from the objection to the parol evidence offered to prove it. Were the action on the notes, and this evidence offered to contradict them, it would be entirely different; because, in an action on a note, parol testimony is not competent to vary its written terms and probably not to vary a blank indorsement by the payee from what the law imports.<sup>1</sup> Civil Code of Louisiana, art. 2256; *Stone et al. v. Vincent*, 6 Mart. (La.) N. S., 517; 15 La., 539; 10 Id., 205; 1 Pet., C. C., 84; *Bank of the United States v. Deane*, 6 Pet., 59; 3 Campb., 56, 57; 9 Wheat., 587; 1 Mart. (La.) N. S., 641; Chit. Bills, 541; 12 East, 4; 4 Barn. & Ald., 454. So, between the contracting parties, likewise, all prior conversation is supposed, as far as binding, to be embodied into the written contract. 4 L., 269; *Taylor v. Riggs*, 1 Pet., 591; 8 Wheat., 211. But the parol evidence \*292] here is not offered \*in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note, or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires in such cases, and this evidence is plenary and entirely satisfactory to substantiate the separate contract. It is true, at the same time, that, after a prior indorser has paid a note, he cannot recover, even in an action, not on it, but for contribution of one half from a second indorser, if they were not in fact joint sureties, nor in fact made any collateral contract whatever, nor in fact had any communication whatever as to their liability. *McDonald v. Magruder*, 3 Pet., 474; 3 Harr. & J. (Md.), 125; 7 Johns. (N. Y.), 367.

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<sup>1</sup> CITED. *Clark v. Manufacturers' Ins. Co.*, 8 How., 246.  
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But the present is a case differing, *toto cælo*, from that. Here, by a deliberate arrangement before a public notary, and by the positive evidence of two witnesses, the two indorsers were co-sureties, and specially agreed to bear any loss equally between them; and the right to recover is, therefore, entirely clear. 3 Pet., 477; *Douglass v. Waddle*, 1 Hamm. (Ohio), 413, 420; *Deering v. The Earl of Winchelsea*, 2 Bos. & P., 270.

There are two or three other views connected with this part of the case, which may be usefully adverted to, but by which we do not decide it.

Thus, where a person like Phillips, the original defendant, was not a party to a note, but put his name on the back of it, parol testimony has been deemed competent to show the real object for which it was placed there; and especially if it did not contradict any legal implication from the name being there. And hence, under circumstances like these, where, as in Louisiana and some other States, it is implied by law that such a person puts his name there as a surety or guarantor, no objection exists to parol proof to that effect. 10 La., 374; *Lawson v. Oakey*, 14 Id., 386; *Nelson v. Dubois*, 13 Johns. (N. Y.), 175; *Dean v. Hall*, 17 Wend. (N. Y.), 214; 5 Mass., 358; 12 Id., 281; 1 Vt., 136; *Ulen v. Kitteridge*, 7 Mass., 233; 4 Wash. C. C., 480; 5 Serg. & R. (Pa.), 363. In *White v. Howland*, 9 Mass., 314, he is held to be liable as if signing with the maker as a surety. But however much, in some States, the practice may go beyond this in suits between the parties to the agreement, as in 1 Hamm. (Ohio), 420, and 5 Serg. & R. (Pa.), 363, it could generally not be competent to prove any thing by parol, in actions on the note, contrary to what is written or to what is implied in law. *Bank of the United States v. Dunn*, 6 Pet., 59.

And in other States and in other circumstances, where the inference of law is not that such a name is placed there as a surety, it is very doubtful whether, in a suit on the note, proof that he did it only as a surety is competent. 6 Mart. (La.) N. S., 517; *Bank of the United States v. Dunn*, 6 Pet., 59.

\*In England, in the case of such a name on the back of a bill of exchange, the person may be treated as a new drawer (Chit. Bills, 241); and if the payee there has also indorsed the note, the implication deemed most proper is, that another name on the back is that of a second indorser, and should so be held in the hands of third persons. Chit. Bills, 188, 528; Holt, 470; 5 Ad. & E., 436; 6 Nev. & M., 723. So, 6 Mart. (La.), 517. It will be seen, however,

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that these last are generally cases of actions on the notes or bills of exchange themselves, while the present case is not brought on the note itself, but on a distinct and collateral contract.

Another suggestion bearing on the case might be, that in Louisiana the surety, when paying, may step into the shoes of his creditor, if he pleases, by subrogation, and enjoy all his rights against the debtors or other sureties. *Hewes et al. v. Pierce*, 1 Mart. (La.) N. S., 361; *Calliham v. Fanner*, 3 Rob. (La.), 299; Civil Code of Louisiana, art. 2157. But there the suit is probably in the creditor's name, and not, as here, in that of the surety. So, in some countries where the civil law prevails, such a contract as this, deliberately made before a notary, and by him reduced to writing by request of the parties, would in law be deemed equivalent to a contract in writing; and on that ground be admissible even in a suit on the note between the original parties to it.

The doings of the parties thus have a sort of public form given to them, *quasi* judicial, and they are bound by them, though not signed by the parties. 2 Domat's Civil Law, b. 2, tit. 1, § 1, art. 28, and tit. 5, § 5, pp. 661, 662. It would be there deemed an act of too much deliberation by the parties, and of too much formality before that public officer, to be treated merely as an ordinary verbal arrangement. Coop. Justinian, 586; 3 Burr., 1671; Story, Bills, § 277. But, though the Louisiana code, founded chiefly on the civil law, may not expressly abrogate such a doctrine, it does not in terms make records by a notary valid, unless signed by the parties, or consisting of copies of papers signed by the parties and acknowledged before witnesses. Civil Code, art. 2231, 2413; 8 Mart. (La.) N. S., 568; 10 La., 207, 354. And though the paper containing this is signed by the parties to the sale and attested by witnesses, it is not signed by Preston and Phillips, the parties to this arrangement.

It is not necessary, however, to decide absolutely on the effect of either of these last views. Deeming the action here to be founded on the collateral agreement, and deeming the evidence offered to be competent, for the reasons first stated under this head, these conclusions will virtually dispose of the last six exceptions contained in the record of this case.

Thus, as to Barrow's deposition, the admission of which was the ground of one of these exceptions, it is clearly competent to prove this \*separate parol contract in a suit on that, and not on the note. So, the certificates and notices, also excepted to, were properly proved as a part of the collateral transaction under the general expressions in

the petition, and not as notices that should be specially set out in a declaration, where notes are counted on by a holder. In a case like that, the averment of them and the proof are highly material, but in the former case they are rather historical and merely a part of the *res gestæ*, without its being essential to give them in detail. The original plaintiff avers in the petition that the notes were protested, and that he was obliged to pay them, which would not have been the case without due notices; and this is quite enough in an action on a collateral undertaking.

So, the notary's evidence, which is another of the exceptions, becomes under this aspect entirely competent, and the written memorandum made by him at the time, which is another objection, was also admissible evidence to refresh his memory, if not *per se* of the facts stated in it. Greenl. Ev., §§ 436, 437. That it was admissible to refresh his memory, see *Smith v. Morgan*, 2 Moo. & Rob., 259; *Horne v. McKenzie*, 6 Cl. & F., 628. Other cases say such a memorandum is admissible itself to go to the jury. Greenl. Ev., § 437, note; 1 Rawle (Pa.), 182; *Smith v. Lane et al.*, 12 Serg. & R. (Pa.), 84; 2 Nott & M. (S. C.), 331; 15 Wend. (N. Y.), 193; 16 Id., 586-598. If this last be a rule controverted, the writing here was "the act of sale," and contained other matters as to the transaction in connection with this as the whole terms of sale, which were clearly competent, and the whole properly went together to the jury as exhibiting the progress and character of the transaction, beside being admissible to refresh the memory of the witness. *Bullen v. Michel*, 2 Price, 422, 447, 476.

So, the evidence of the sale of Carr's property and of the transfer of it to the original plaintiff, Preston, by the sheriff, and the terms of the transfer, though objected to, are mere links in the chain of the transaction, and unexceptionable in that view; and were, like the evidence of the former sale to Carr by Barrow, duly authenticated.

Upon the whole case, then, we are happy to find that no legal objection seems to be tenable against making the original defendant meet an engagement which, on the record, he appears to have been bound in honor and justice, no less than law, faithfully to discharge. Although the court have deemed it proper thus to deliver an opinion on this case, as it has been argued by the counsel for the plaintiff in error, yet the death of the plaintiff has since been suggested; and no appearance is entered for the defendant. We shall not, therefore, enter judgment in conformity to the opinion until the defendant or the representatives of the deceased appear.

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\*295] \*JAMES INNERARITY, PLAINTIFF IN ERROR, v.  
THOMAS BYRNE.

A citation is not necessarily a part of the record, and the fact of its having been issued and served may be proved *aliunde*.

*Mr. Bagby* moved to dismiss the writ of error in this case for the want of a citation. None appeared in the record.

Mr. Justice McLEAN delivered the opinion of the court, saying, that the citation was not necessarily a part of the record, it forming no part of the proceedings of the court below. The presumption is, that one was issued when the writ of error was allowed, and it may be proved *aliunde*.

Motion overruled, and case continued to next term.

WILLIAM G. COOK, PLAINTIFF IN ERROR, v. JOHN L.  
MOFFAT AND JOSEPH CURTIS, DEFENDANTS IN ERROR.

A contract, made in New York, is not affected by a discharge of the debtor under the insolvent laws of Maryland, where the debtor resided, although the insolvent law was passed antecedently to the contract.<sup>1</sup>

The prior decisions of this court upon this subject reviewed and examined.

<sup>1</sup> CITED. *Planters' Bank v. Sharp*, 6 How., 328; *Supervisors v. Galbraith*, 9 Otto, 218; *Gebhard v. Canada Southern R'y Co.*, 17 Blatchf., 418.

See also *Hills v. Carlton*, 74 Mo., 160; *Bedell v. Scruton*, 54 Vt., 495.

A non-resident plaintiff who has brought suit in the courts of the State where the defendant resides has subjected himself to the jurisdiction of that State, and is bound by a discharge afterwards granted under the insolvent laws of that State. *Davidson v. Smith*, 1 Biss., 346. By obtaining a judgment in the Circuit Court of the United States for another State, upon a record of the judgment of the State court, the plaintiff has not changed his position. A satisfaction of the judgment in the State court would operate as a satisfaction of that in the United States court; and whatever would bar the former, would also bar the latter. Although a State insolvent law has no force or validity outside of the State, except such as may be given it by comity, the principle of the Con-

stitution of the United States, that full faith and credit shall be given in each State to the judicial proceedings of every other State, requires that judgments when sued on in another State shall be considered of the same force and effect as in the State wherein they were originally rendered. *Ib.*

A discharge of a debtor under a State insolvent law is invalid against a creditor or citizen of another State who has never voluntarily subjected himself to the laws of the State where the discharge was obtained, otherwise than by the origin of his contract, and the plea of such discharge is insufficient to bar the rights of the plaintiff. *Hale v. Baldwin*, 1 Cliff., 511; *Steeveson v. King*, 2 Id., 1; *Byrd v. Badger*, McAll., 263; *Kendall v. Badger*, Id., 523.

Such discharges are valid as to alien creditors residing in the State at the time the contract was made. *Van Glahn v. Varrenue*, 1 Dill., 515.

A negotiable note endorsed to a non-resident of the State wherein the

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THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

Cook was a citizen of Maryland, and Moffat and Curtis were citizens of New York.

It was an action brought, in July, 1835, by Moffat and Curtis against Cook, upon the common money counts. Cook confessed judgment, subject to the opinion of the court upon the following case stated, namely:—

*In Circuit Court of the United States, Fourth Circuit, District of Maryland.*

*John L. Moffat and Joseph Curtis, surviving partners of Jonathan Wilmarth, v. William G. Cook.*

*Statement of Facts.* John L. Moffat, Joseph Curtis, and Jonathan Wilmarth (the last of whom is now deceased) were citizens of the State of New York and resident there, and partners trading under the name and firm of Wilmarth, Moffat, & Curtis, and the defendant was a citizen and resident of Maryland during the times when the contracts and transactions upon which this suit is founded, or which constitutes the causes of this action, were entered into and had and made between the said firm and said Cook.

That the course of dealing was, that Cook, the defendant, used to write to said firm, ordering such articles or goods as he wanted, and they, said firm, sent them to him, and charged the goods in \*their books. In order to settle the account current from time to time, Cook sent to the said [\*296

firm (usually by mail, sometimes, perhaps, otherwise) his note at six months, and these notes averaged \$500 per month, and were punctually paid, for a time, in Baltimore. Cook at length became embarrassed, and wanted extensions, until he stopped payment entirely; being then indebted to said firm, on book account,	\$2,104 98
And owing 1 note, due 4th April, 1832, for	500 00
“ 1 note, due 14th May, 1832, for	500 00
“ 1 note, (do not know exactly when due),	416 02
“ 1 note, due 2d June, 1832, for	500 00
“ 1 note, due 30th June, 1832, for	500 00
“ 1 note, due 1st July, 1832, for	800 00
“ 1 note, due 13th August, 1832, for	500 00
“ 1 note, due 24th September, 1832, for	500 00
Total debt,	\$6,321 00

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discharge is granted, is not barred by Wood. & M., 115; see *Perry Manuf. Co. v. Brown*, 2 Id., 449.

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The above notes were remitted by Mr. Cook to said firm previously to March, 1832, when he stopped payment. On the 7th June following, his New York creditors generally agreed to give him time to pay, and the said firm of Wilmarth, Moffat, & Curtis, about that time, by arrangement made with Mr. Disosway, Cook's attorney in New York, gave time, and took Cook's three notes, drawn payable to the said firm, for the sums following, all dated 12th May, 1832, as the respective time as follows, viz. :—

One, 12 months after date, for . . . . .	\$2,107 00
One, 15 months after date, for . . . . .	2,107 00
One, 18 months after date, for . . . . .	2,107 03
	<hr/> \$6,321 03

These notes were drawn and dated at Baltimore by Cook, and sent by him to his said attorney at New York, and there delivered by said attorney to the said firm; they were given for the amount of Cook's account, and the notes then had and held by said firm against Cook; the old notes being then given up to his attorney. These three notes and the consideration thereof, namely, the goods sold and delivered as aforesaid, constitute the ground of this action; the amount of the notes being the amount claimed. It is also admitted, that said Cook has applied for and obtained the benefit of the insolvent laws of Maryland since such notes fell due.

EDWARD HINKLEY, *Attorney for Plaintiffs.*  
J. GLENN, *for Defendant.*

Upon the foregoing statement of facts, the plaintiffs pray for a general and unqualified judgment, notwithstanding the release of Cook, since the making of said notes, under the insolvent laws of Maryland; and the plaintiffs rely upon \*297] the cases of *Ogden v. \*Saunders*, 12 Wheat., 213; *Boyle v. Zacharie and Turner*, 6 Pet., 634; *Frey v. Kirk*, 4 Gill. & J. (Md.), 509.

The circumstance of the notes being dated and made at Baltimore, in favor of citizens, at the time, of New York, does not make the contract a Maryland contract, any more than did the acceptance of bills of exchange by Mr. Ogden, in the State of New York, make such acceptance a New York contract, so as to be discharged by Mr. Ogden's release under the insolvent laws of that State.

The evidences of contracts made between citizens of different States cannot bear date in both the States of the respective parties. In the nature of things, and according to the



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course of business, they would bear date and be signed by one party only, in one of the States ; most commonly in the State of the citizenship and residence of the party signing. And it would be immaterial in principle in which of the States it might bear date. It is a contract between citizens of different States at the time when made, and this is the fact and the principle which excludes it from the operation and effect of a release of the debtor under the insolvent laws of his State.

EDWARD HINKLEY, *Attorney for Plaintiffs.*

1. The defendant's attorney insists that the contract was to be performed in Maryland, and governed by the laws of Maryland, and that the judgment must be to exempt the future acquisitions of the defendant from execution.

2. That at all events the judgment must be so entered as to exempt the defendant's person from arrest.

J. GLENN, *for Defendant.*

*Judgment for the Plaintiffs upon the Case stated.*

Whereupon, all and singular the premises being seen, heard, and by the court here fully understood, for that it appears to the court, that the said John L. Moffat and Joseph Curtis are entitled to recover in the plea aforesaid. Therefore, it is considered by the court here, that the said John L. Moffat and Joseph Curtis recover against the said William G. Cook, as well the sum of twelve thousand dollars, current money, the damages in the declaration of the said John L. Moffat and Joseph Curtis mentioned, as the sum of seventeen dollars and twenty-five cents adjudged by the court here unto the said John L. Moffat and Joseph Curtis, on their assent, for their costs and charges by them about their suit in this behalf laid out and expended. And the said William G. Cook in mercy, &c.

*Memorandum.* Judgment rendered in this cause on this 21st day of April, 1836, for the damages laid in the declaration and costs of suit; the said damages to be released on payment of \$7,335.57, with interest from 21st day of April, 1836, and costs of suit.

*Memorandum.* That no execution against the person of the defendant be issued in the above cause on said judgment without the leave of the court.

\*To review this judgment the case was brought up to this court. [\*298

The cause was argued by *Mr. Mayer*, and *Mr. Johnson*, for  
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the plaintiff in error, and *Mr. Hinkley*, for the defendants in error.

*Mr. Mayer* entered into a critical analysis of all the opinions which had been given in this court on the subject of State insolvent laws, from all which he argued, that the philosophy of the law had never been settled; that, in consequence of the want of harmony in those opinions, the whole subject ought to be again reviewed. There was a difficulty in annexing a meaning to some terms in the constitution which were in themselves uncertain; such, for example, as the phrase, "impairing the obligation of contracts." This expression was supposed to include a prohibition to pass insolvent laws; and yet in *Sturges v. Crowninshield*, 4 Wheat., 122, it appeared to be conceded that a State might pass such laws, operating only upon its own citizens. It was also admitted, on all hands, that the United States could pass bankrupt laws, which dissolved a contract entirely. Now, if these laws were prohibited on account of their supposed dishonesty, it was unaccountable that a power to extend them over the whole nation should have been conferred upon Congress. Certainly laws do not become less mischievous by becoming more extensive. It would seem as if bankrupt laws were not considered as impairing the obligation of contracts. In the debates of 1787, they were spoken of as mere commercial regulations, like damages upon bills of exchange. Luther Martin says that the prohibition meant to exclude tender laws, and retrospective laws. All nations have bankrupt laws, and it is not surprising that the power to make them was given to Congress, as auxiliary to the general one of regulating commerce. These State laws only stay all judicial proceedings, like statutes of limitation. It will not do to say that statutes of limitation rest on a presumption that the debt has been paid, because where they apply to land there can be no such presumption.

In support of these and similar views he cited Secret Proceedings and Debates of the Convention, Yates's Notes, 70, 71, 246, 247; 3 Madison Papers, 1442, 1443, 1448, 1480, 1549, 1552, Federalist, 80th number; Story, Conf. of L., §§ 312, 395, 404, 422, 438.

*Mr. Hinkley*, for defendants in error.

It is understood that the question raised upon the statement of facts in this case was decided in the case of *Ogden v. Saunders*, 12 Wheat., 213.

It will be contended that the court cannot consistently with

law and the constitution of the United States give an effect to State insolvent laws greater or more extensive than that given by the decision in that case.

\*The constitution is to be construed with reference [\*299 to its general as well as to its particular intents.

The general government emanates from the people, and its powers are to be exercised directly upon them and for their benefit. *McCulloch v. Maryland*, 4 Wheat., 316; *Cohens v. Virginia*, 6 Id., 413.

Moreover the constitution is an agreement or compact between each individual of the people and all the rest, as well as between each one of the States and all the others.

The States, as to their sovereign and exclusive powers, are foreign to each other, as well as to the federal government. *Woodhull et al. v. Wagner*, Baldw., 296.

It is said that there is great obscurity in the clause of the constitution, art. 1, § 10, which declares, among other things, that "no State shall pass any law impairing the obligation of contracts." But if we construe the language as it stands, it is clear, that, forming what logicians call a universal negative proposition, and being absolute and imperative,—

1. It excludes every kind and degree of what it prohibits, whatever that be. This has been seen by the court. *Sturges v. Crowninshield*, 4 Wheat., 122; *Green v. Biddle*, 8 Id., 84.

2. Consequently it excludes every cause, mode, and manner, by which the thing prohibited may be effected. Hence it is immaterial what may be the title, provisions, or professed object of a State law, if, in its effect, it impair the obligation of a contract in the sense of the constitution.

3. It may be admitted, that, in the absence of any bankrupt law of Congress, the States may pass insolvent or bankrupt laws, provided their effect be not extended to impair the obligation of contracts. The power granted to Congress by the constitution, art. 1, § 8, "to establish uniform laws on the subject of bankruptcies throughout the United States," is permissive, not imperative. The decisions which are in accordance with this construction need not be disturbed, however difficult it may be to reconcile the exercise of the power by the States with the prohibitory clause in relation to impairing the obligation of contracts. Perhaps it can only be done in the manner in which it has been done by the decision of Justice Johnson in the case of *Ogden v. Saunders*, by allowing the States to legislate for their own citizens in matters exclusively within the jurisdiction of their own courts, but not for citizens of other States who have a right to the jurisdiction of the courts of the United States. The justice, policy, or humanity

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of insolvent or bankrupt laws is not so much a question for the courts as for the legislatures. If the State legislatures can constitutionally pass such laws, their own courts may be bound to administer them to all suitors within their jurisdiction. See *Babcock v. Weston*, 1 Gall., 168.

4. A creditor may waive his constitutional rights. *Consensus vincit legem*. What acts may amount to a waiver it is for the court to determine. It has been decided, that receiving a dividend under the insolvent law of a State is evidence of a waiver. *Clay v. Smith*, 3 Pet., 411. Making himself a party to the proceedings under a State insolvent law in other ways may have the same effect. *Baldw.*, 299; *Buckner v. Finley*, 2 Pet., 586. But a citizen of one State, by simply becoming a party to a commercial contract with a citizen of another State, does not waive any right under the constitution of the United States. This point is involved in the question put for decision by Justice Johnson in the case of *Ogden v. Saunders*, 12 Wheat., 358. If, indeed, this were construed to be a waiver, it would in effect take away the jurisdiction of the courts of the United States. What now is the meaning of the phrase *impairing the obligation of a contract*?

The word *contract* is an artificial term of very extensive signification. It is collective and generic, embracing a great number of individuals, but comprehending only the essential properties of each. It may be defined an agreement, not prohibited by law, between two parties at the least, whereby each, for a sufficient consideration, promises or undertakes to do or not to do something. What one promises or gives is ordinarily the consideration for what the other promises or gives. There is a duty imposed on each party by the laws of God and by the laws of man, in civil society, to perform what is stipulated in the contract on his part to be performed. This is the obligation of the contract.

There may be, and usually are, two obligations in a contract, one appertaining to each party. When one party has fulfilled his obligation, there remains only the obligation of the other party. Although the contract include a moral as well as a legal obligation, yet the legal obligation only is intended in the constitution. The moral obligation acts upon the conscience, understanding, and free will of man, and cannot be enforced by human laws or courts of justice. It may die and revive again. It may remain and be the consideration of a new promise after the legal obligation is released by law. According to Webster, the word *impair* is of French derivation, and signifies to make worse, to lessen the value of.

With reference to the constitution of the United States the term *contracts* must embrace all subjects to which the judicial powers extend, whether of common law, equity, or admiralty and maritime jurisdiction.

The contract in question is one of common law jurisdiction, and must be adjudicated with reference to the rules of this jurisdiction. There are three sources of law, to one or more of which the court may look for rules to guide. They are distinguished as *lex rei sitæ*, *lex loci contractûs*, and *lex fori*. Much depends upon a correct understanding and applicability of these laws, in any given case, as to the results to which the court may be led.

\*If the subject of the contract be land, the *lex rei sitæ* takes precedence, and the place of the contract, [\*301 or the citizenship or domicile of the parties, is immaterial. All rights and titles in the subject must be governed by the law of the State in which it is situate. And the decisions of the courts of the State will be respected as to what the law is. *Bronson v. Kinzie*, 1 How., 316. The *lex loci contractûs* is said in general to govern in determining the nature, validity, and interpretation of contracts. Story, Conf. of L., § 241; *The Bank of the United States v. Donally*, 8 Pet., 361. And sometimes the law of the place where the contract is to be performed is said to govern.

There is a nice discrimination to be made by courts in regard to the source of the law, as well as to the nature of the law, which ought to govern them.

As to the contract now under consideration, we are furnished with no law, either of New York or of Maryland, in regard to its nature, validity, or interpretation. If not prohibited, it is not to be adjudged by their laws. The right of the parties to enter into the contract was not granted by either of those States. It is a right of personal liberty which was conquered by our fathers, and was inherent in the people when the State governments were formed, as well as when the general government was established. The States of the contract were silent as to the laws of the contract, and therefore the law of the former must govern it. Indeed, what is intended by the *lex loci contractûs* would seem to be, not the territorial law, but the law of the government under whose jurisdiction the parties are, in reference to the contract. If the territorial law is silent, and the citizenship of the parties gives them a right to resort to an independent forum, the law of this forum will be the law of the contract.

Jurisdiction given in consideration of personal attributes or qualifications is not always controlled or lost by temporary

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domicile within the territorial surface or sphere of a subordinate jurisdiction. And this appears to have been the law of the Roman empire in the first century. For, when St. Paul was accused before Festus at Cesarea, being a Roman citizen, he appealed to Cæsar; and his appeal was allowed. And afterwards, when Agrippa had heard his noble defence, he told Festus that he found nothing in the man worthy of death or of bonds, and that he might have been set at liberty, if he had not appealed to Cæsar. After the appeal, neither the governor nor the king could decide the cause. The jurisdiction was gone. And Paul was sent a prisoner to Rome.

Residence of aliens within a State of the Union constitutes no objection to the jurisdiction of the federal court. *Breedlove et al. v. Nicolet et al.*, 7 Pet., 413.

The constitutional right of a citizen to sue in the Circuit Courts of the United States does not permit an act of insolvency, executed \*under the authority of a State, to be a bar against a recovery upon a contract made in another State. *Suydam et al. v. Broadnax*, 14 Pet., 67. This case decides to what extent the jurisdiction of the United States will prevail over that of the States, and how far the laws of the States can interfere with the remedies afforded by the courts of the United States.

Neither the statutes of the States nor decisions of the State courts apply to questions arising in a court of the United States upon contracts of a commercial nature. *Swift v. Tyson*, 16 Pet., 1; *Amis v. Smith*, Id., 303. This court, then, is not to be restrained by any State law in passing judgment upon the contract in question.

To revert to the consideration of the obligation of the contract, what does it require the court to do? what judgment to pronounce? I have said it is the duty imposed upon the party to perform what he has stipulated. It is argued on the other side, that the creditor ought to submit to the insolvent law of the State of which the debtor was a citizen when the contract was made, as he must have contemplated the possibility that the debtor would avail himself of this law. But before insolvency happens, the expectation of the creditor, and of the debtor too, if he is honest, is, that the debt will be paid without default. It is not probable that the remedy is in the contemplation of the parties. It is not strictly a part of the contract. It is a legal right arising after breach or default, secured by the constitutions and the laws. It is not necessary to be contemplated at the time when the contract is made, in order to be appropriated after the contract is broken. It may be resorted to when there is occasion for its

use. And as between the remedy afforded by the State and that by the United States, the latter may be esteemed superior and preferable, and as the creditor has the right of election, it may be presumed, that if he contemplated any remedy at the time of entering into the contract, it was that which he has elected. It is in accordance with the rule of the common law, that of two concurrent jurisdictions a party may elect the superior one. The court are now to render judgment. The obligation of the debtor as a party to the contract is clearly seen and admitted. It is to pay a certain sum in gold or silver coin. But the State, by her act, interposes a release of the debtor, against the will of the creditor, and would thereby bar a judgment corresponding with the debtor's obligation. Does not the constitution mean, by the obligation of a contract, the obligation entire and full, and in all the integrity and with all the value that was given to it by the terms of the contract? We answer in the affirmative. For if the court give judgment for the value of the obligation after the State law has acted on it, and after the release shall have been applied, then it suffers exactly what is prohibited by the constitution. It suffers the law to impair the obligation. And so every obligation might be impaired to any extent, or wholly \*destroyed. The judgment is a [\*303 record of the obligation, or more exactly of the duty which the constitution and the law imposes upon the debtor in order that he discharge his obligation.

It would appear, therefore, that in cases in which a court of common law of the United States has jurisdiction over a commercial contract, valid by the law of the State or States where made, a State insolvent law cannot be applied to impair the obligation of the contract in suit. That the forum has law of its own, and that this is the law to be administered, in order to determine and adjudge what is the obligation of the contract.

It has been said, that, by reason of the doubts in regard to the meaning of the constitution upon this question, resort must be had to external evidence, to the history of the times prior to the formation of the constitution, and to the debates of the convention had upon that instrument. In the view we have taken, there does not appear to be any obscurity in the phrase, *impairing the obligation of contracts*. And, unless there is obscurity or latent ambiguity, it is a rule that you cannot go out of the instrument for explanation. And it is a well-settled rule of evidence, that what may have passed pending negotiations for a contract does not form a part of the contract finally agreed upon and deliberately executed.

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And this rule applies with great force to an instrument of so grave and solemn a character as the constitution of the United States.

But the debates do not seem to furnish any thing that militates with the construction which we have given to the phrase in question. It is said that they furnish evidence that none but *retrospective* laws were intended to be prohibited. At page 1448 of volume 3 of the Madison papers, it is found that "Mr. King moved to add, in the words used in the ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts." Upon which there was debate, which see; Mr. Morris and Colonel Mason being against, and Mr. Sherman, Mr. Wilson, and Mr. Madison in favor of the motion. And at page 1444, Mr. Wilson stated, "The answer to these objections is, that retrospective *interferences* only are to be prohibited." Whereupon "Mr. Rutledge moved, instead of Mr. King's motion, to insert, 'nor pass bills of attainder, nor retrospective laws'";<sup>1</sup> upon which seven States voted in the affirmative and three in the negative. At page 1450, Mr. Dickinson mentioned that *ex post facto* related to criminal cases only; that some further provision was necessary to restrain the States from retrospective laws in civil cases. At page 1552, we find the words *altering* or *impairing* the obligations of contracts introduced into the tenth section of art. 1. At page 1581, we find the first clause \*304] of art. 1, § 10, altered so as to read as it now stands in the constitution. And there does not appear to have been any debate upon this section in this form.

It is stated that Mr. Gerry entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, and alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

Now it is a sufficient answer to all that may be inferred from the remark of Mr. Wilson, or any other member of the convention, that the phrase *retrospective laws* was not finally adopted, although it appears to have been suggested. And in the absence of all debate or explanation of the phrase, or *law impairing the obligation of contracts*, we are left to construe it according to its plain meaning. It is said that it could not be meant to restrain the States from passing bank-

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<sup>1</sup> In a note it is said that in the printed journal this was *ex post facto*. If the debates were upon this phrase, there is no inference to be made as to the meaning of terms in question.



rupt or insolvent laws, which the framers of the constitution must have approved, inasmuch as they gave Congress power to pass a uniform law upon the subject of bankruptcies throughout the States. But if the States were qualified to pass acceptable laws on this subject, what need was there of a law of Congress? The inference is the rather, that, while it admitted the power of States to pass such laws, that either the character or effect of them was objectionable.

It is admitted that retrospective laws were intended to be prohibited, as impairing the obligation of contracts. But insolvent and bankrupt laws are usually retrospective; therefore they could not have been intended to be wholly excluded from the prohibition.

The fair meaning of the clause, as to impairing the obligation of contracts, is, that the prohibition or restraint was laid upon the States, and took effect from the moment the constitution was adopted, so that it was not afterwards competent for any State to pass any law which might have the effect to impair the obligation of any contract to be thereafter made.

As to the distinction between the *right* and the *remedy*, it is proper when used to distinguish what is stipulated in the contract, supposing it to be performed without breach, and what the law will compel the delinquent party to do in consequence of his failure to do what he has stipulated. But the remedy is the fruit of the contract, and it is the whole value of the obligation of the delinquent party. This obligation continues as an obligation of the contract at the time of the judgment, and afterwards until satisfaction, or until the judgment dies by lapse of time.

It is difficult to decide in every case how far the remedy may be modified without impairing the obligation. The remedy is given by the United States, although it is adopted from the laws and practice of the States respectively. The only general rule seems to be to distinguish between *form* and *substance*. The remedy cannot be wholly taken away, nor essentially impaired. See *Green v. Biddle*, \*8 Wheat., [\*305 1-75; *Bronson v. Kinzie*, 1 How., 316; *McCracken v. Hayward*, 2 Id., 608.

It may be difficult, in strict reasoning, to prove that imprisonment is only a form of remedy. But as gold or silver is the only thing that can constitutionally satisfy the debt, and as an incarcerated body cannot be sold or put into slavery, it seems to be no direct remedy at all, and as a punishment it is unjust against an honest man.

Upon the whole, the judgment ought to be affirmed, and the decisions rest undisturbed.

*Mr. R. Johnson*, for the plaintiff in error, in reply to *Mr. Hinkley*, divided the subject into the four following heads:—

1. What points have been decided by this court.
2. How far the points decided bear upon the present case.
3. Under all the circumstances of the opinions given, whether it is not justifiable and proper to look into those opinions.

4. That the law of the case was with the plaintiff in error.

The debtor was a citizen of Maryland at the time of contracting the debt, and at the time of his discharge. Anterior to the Revolution, the State had bankrupt laws which discharged the debt, as well as the person of the debtor. Act of 1774. After the Revolution, special acts were passed from time to time, all of which discharged the debts themselves. In 1805, a general system was established, more extensive than that of 1774. From 1805 to the time when this court decided the case of *Sturges v. Crowninshield*, no doubt existed of the constitutionality of these laws, either as respecting debts or debtors. The bankrupt law of the United States passed in 1800 recognized State laws. The decision in *Sturges v. Crowninshield* took the States and the profession by surprise. It was a matter of astonishment that up to that time the States had all been wrong. But this surprise was lessened when the case came to be discussed afterwards by the bench as well as the bar, in *Ogden v. Saunders*. (*Mr. Johnson* here went into a minute examination of the opinions of the judges in that and subsequent cases.

The doctrine cannot be correct, that Maryland law means one thing when applied to her own citizens, and another thing when applied to other persons. The constitution of the United States is obligatory within a State itself, as well as between citizens of different States. The protection which it extends over all extends to persons in the same State, and if such protection prevents the claims of a foreign creditor from being destroyed by an insolvent law, it must equally secure the claims of a domestic creditor. The result will be, that such laws must be entirely swept away, even as regards the internal concerns of a State; in which her own citizens alone have an interest. But this conclusion is not likely to be  
 \*306] adopted. The power of a State to pass such laws is not denied. 4 Wheat., 136; 12 Id., 277.

Contemporaneous construction has acquiesced in this power. The Federalist does not deny it. State judiciaries acted on it. No convention where the constitution was discussed ever thought it an objection that this power was taken away from the States. Millions have been distributed

by its exercise. As an attribute of sovereignty, a government cannot get along without it. Such laws are known to all the globe where commerce is known. The hazards of life and business make it certain that some men must be ruined. At first, these laws were passed solely for the benefit of creditors, and bankrupts were punished as guilty. But a more benign spirit at length taught, that men might become poor and bankrupt from misfortune as well as crime. The framers of the constitution did not hold it to be immoral to discharge debtors, because they gave the power of doing so to the United States. The forty-second number of the Federalist says, that the expediency of such a power is not likely to be drawn into question. Can the constitution be made to say that State laws are unjust, and that the same laws by the United States are not unjust? Or does it rather mean, that under the operation of State laws a sufficient amount of good could not be obtained? State laws cease with their limits. A debtor might be free within his own State, but not beyond it. Giving all possible effect to the Maryland insolvent laws within her limits, yet if a bankrupt debtor went beyond, he was unprotected; and the constitution must have intended to supply this deficiency, by giving to Congress power to pass a law which should protect him everywhere. But there is nothing in this hostile to State insolvent laws. On the contrary, it is recognizing them and extending their beneficial influence. The objection is, that there is no uniform system; not that the whole system should be broken up and destroyed. There are higher moral obligations than those of debtor and creditor. It is the duty of a man to live for the happiness of his parent or child, and a wise government will place no insuperable barrier in his way to debar him from fulfilling these duties. Upon this ground, and under the power of a State to control remedies at law, tools, &c., are exempted from surrender. But upon the theory of the opposite counsel, this humane provision must be swept off, because he says the law of a contract is to pay to the uttermost farthing. But the laws of humanity will not permit such utter ruin, nor did the constitution intend it. The forty-fourth number of the Federalist, page 192, by Mr. Madison, says, that bills of attainder and *ex post facto* laws are contrary to the principles of the social compact everywhere, and therefore the power to pass them is denied. But if bankrupt laws had been considered as falling within this category, would the power to pass them have been expressly given to the United States?

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\*307] \*Mr. Justice GRIER delivered the opinion of the court.

This case comes before us by a writ of error to the Circuit Court of the United States for the Maryland District.

Moffat & Curtis, merchants in New York, sold goods to Cook, who resided in Baltimore. On a settlement of their accounts, Cook transmitted his notes to his attorney in New York, who delivered them to the defendants in error. After the notes fell due, Cook applied for and obtained the benefit of the insolvent laws of Maryland. By these laws the debtor, on surrender of his property, is discharged not only from imprisonment, but from his previous debts.

On the trial of this case in the Circuit Court, the plaintiff in error pleaded this discharge, insisting, "that the contract was to be performed in Maryland, and governed by the laws of Maryland in existence at the time it was made; and that, therefore, his discharge under her laws was a good defence to the action." The Circuit Court gave judgment for the plaintiffs, and the defendant prosecuted this writ of error.

That the contract declared on in this case was to be performed in Maryland, and governed by her laws, is a position which cannot be successfully maintained, and was, therefore, very properly abandoned on the argument here. For, although the notes purport to have been made at Baltimore, they were delivered in New York, in payment of goods purchased there, and of course were payable there and governed by the laws of that place. See *Boyle v. Zacharie and Turner*, 6 Pet., 635; Story, Conf. of L., § 287.

The only question, then, to be decided at present, is, whether the bankrupt law of Maryland can operate to discharge the plaintiff in error from a contract made by him in New York, with citizens of that State.

In support of the affirmation of this proposition, it has been contended,—

1st. "That the State of Maryland having power to enact a bankrupt law, it follows as a necessary consequence, that such law must control the decisions of her own forums."

2d. "That the courts of the United States are as much bound to administer the laws of each State as its own courts."

It has also been contended, that the case of *Ogden v. Saunders*, while it admits the first proposition, denies the second, and that this court ought to reconsider the whole subject, and establish it on principles more consistent.

But we are of opinion, that the case of *Ogden v. Saunders* is

not subject to the imputation of establishing such an anomalous doctrine, although such an inference might be drawn from some remarks of the learned judge who delivered the opinion of the court in that case; the question, whether a State court would be justifiable in giving effect to a bankrupt discharge which the courts of the United \*States [\*308 would declare invalid, was not before the court, and was therefore not decided. Nor has such a decision ever been made by this court.

The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States. When this court has declared State legislation to be in conflict with the constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision. A bankrupt law which comes within this category cannot be pleaded as a discharge, even in the forums of the State which enacted it.

It is true, that as between the several States of this Union, their respective bankrupt laws, like those of foreign States, can have no effect in any forum beyond their respective limits, unless by comity. But it is not a necessary consequence, that State courts can treat this subject as if the States were wholly foreign to each other, and inflict her bankrupt laws on contracts and persons not within her limits.

It is because the States are not foreign to each other in every respect, and because of the restraint on their powers of legislation on the subject of contracts, and the conflict of rights arising from the peculiar relations which our citizens bear to each other, as members of a common government, and yet citizens of independent States, that doctrines have been established on this subject apparently inconsistent and anomalous.

Accordingly we find that when, in the case of *Sturges v. Crowninshield*, this court decided "that a State has authority to pass a bankrupt law, provided there be no act of Congress in force to establish a uniform system of bankruptcy," it was nevertheless considered to be subject to the further condition, "that such law should not impair the obligation of contracts within the meaning of the constitution of the United States, art. 1, sec. 10."

It followed, as a corollary from this modification and restraint of the power of the State to pass such laws, that they could have no effect on contracts made before their

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enactment, or beyond their territory.<sup>1</sup> Hence, at the same term, the court unanimously decided, in the case of *McMillan v. McNeil*, that a contract made in South Carolina was not affected by a bankrupt discharge in Louisiana, under a law made antecedently to the contract, although the suit was brought in the Circuit Court of the United States for Louisiana. That case was precisely similar in all respects to the one before us.

In the *Mechanics' Bank v. Smith*, a discharge under a Pennsylvania bankrupt law was held not to affect a contract between citizens of that State, made previous to the passage of the law.

Next followed the case of *Ogden v. Saunders*, which has been made the subject of so much criticism. In that case, Saunders, a citizen of New York, drew bills on Ogden in New York, which \*were accepted and protested there. \*309] Ogden was afterwards discharged under the insolvent laws of New York, passed previous to the contract of acceptance, and pleaded this discharge to an action brought against him in the District Court for Louisiana. A majority of the court there decided,—

1st. "That a bankrupt or insolvent law of any State, which discharges the person of the debtor and his future acquisitions, is not a law impairing the obligation of contracts, so far as it respects debts subsequent to the passage of such law."

2dly. "That a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State."

We do not deem it necessary, on the present occasion, either to vindicate the consistency of the propositions ruled in that case with the reasons on which it appears to have been founded, or to discuss anew the many vexed questions mooted therein, and on which the court were so much divided. It may be remarked, however, that the members of the court who were in the minority in the final decision of it fully assented to the correctness of the decision of *McMillan v. McNeil*, which rules the present case.

The case of *Boyle v. Zacharie*, 6 Pet., 635, is also precisely parallel with the present. The contract declared on was made in New Orleans; the defendant resided in Baltimore, and, on suit brought in the Circuit Court for Maryland, pleaded his discharge under the Maryland insolvent laws, and his plea was overruled.

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<sup>1</sup> FOLLOWED. *Baldwin v. Hale*, 1 Wall., 232.

So far, then, as respects the point now before us, this court appear to have always been unanimous; and in order to meet the views of the learned counsel for the plaintiff in error, we should be compelled to overrule every case heretofore decided on this most difficult and intricate subject. But as the questions involved in it have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision.

So far, at least, as the present case is concerned, the court do not think it necessary or prudent to depart from the safe maxim of *stare decisis*.

The judgment of the Circuit Court is therefore affirmed.

Mr. Chief Justice TANEY.

I gave the judgment in this case in the Fourth Circuit, because, sitting in an inferior tribunal, I felt myself bound to follow the decisions of this court, although I could not assent to the correctness of the reasoning upon which they are founded. And I acquiesce in the judgment now given, since a majority of the justices have determined not to consider the question upon the operation of the insolvent laws of the States as altogether an open one; and undoubtedly, according to the decisions heretofore given, the judgment of [\*310] the Circuit Court ought to be affirmed. But, in my opinion, these decisions are not in harmony with some of the principles adopted and sanctioned by this court, and therefore ought not to be followed.

The opinion delivered by Judge Johnson in the case of *Ogden v. Saunders* was afterwards concurred in and adopted by a majority of the court in the case of *Boyle v. Zacharie and Turner*, 6 Pet., 643. And the subject has not since been brought to the attention of this court until the case now under consideration came before it.

The opinion of Judge Johnson is stated by him in the following words.

"The propositions which I have endeavoured to maintain, in the opinion which I have delivered, are these:—

"1. That the power given to the United States to pass bankrupt laws is not exclusive.

"2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts.

"3. But when in the exercise of that power the States pass beyond their own limits, and the rights of their own

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citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States."<sup>1</sup>

And afterwards, in delivering the opinion of the court in the case of *Boyle v. Zacharie and Turner*, Mr. Justice Story says:—"The ultimate opinion delivered by Mr. Justice Johnson in the case of *Ogden v. Saunders*, 12 Wheat., 213, 358, was concurred in and adopted by the three judges who were in the minority upon the general question of the constitutionality of State insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the three other judges who concurred in the judgment. So far, then, as decisions upon the subject of State insolvent laws have been made by this court, they are to be deemed final and conclusive."

To the first two propositions maintained in the opinion of Judge Johnson, thus sanctioned and adopted, I entirely assent. But when the two clauses in the constitution therein referred to are held to be no restriction, express or implied, upon the power of the States to pass bankrupt laws, I cannot see how such laws can be regarded as a violation of the constitution of the United States upon the grounds stated in the third proposition. For bankrupt laws, in the nature of things, can have no force or operation beyond the limits of the State or nation by which they are passed, except by the comity of \*311] other States or nations. And it is \*difficult, therefore, to perceive how the bankrupt law of a State can be incompatible with the rights of other States, or come into collision with the judicial powers granted to the general government. According to established principles of jurisprudence, such laws have always been held valid and binding within the territorial limits of the State by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation; and they have never been considered, on that account, as an infringement upon the rights of other nations or their citizens. But beyond the limits of the State they have no force, except such as may be given to them by comity. If, therefore, a State may pass a bankrupt law in the fair and ordinary exer-

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<sup>1</sup> FOLLOWED. *Baldwin v. Hale*, 1 Wall., 231. See also *Torrens v. Hammond*, 10 Fed. Rep., 902.



cise of such a power, it would seem to follow, that it would be valid and binding, not only upon the courts of the State, but also upon the courts of the United States when sitting in the State, and administering justice according to its laws; and that in the tribunals of other States it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other. But how far this comity should be extended would be exclusively a question for each State to decide for itself, by its own proper tribunals; and there is no clause in the constitution which authorizes the courts of the United States to control or direct them in this particular. It would be a very unsafe mode of construing the constitution of the United States, to infer such a power in the tribunals of the general government, merely from the general frame of the government and the grant to it of judicial power.

I propose, however, merely to state my opinion, not to argue the question. For since the year 1819, when the validity of these State laws was first brought into question in this court, so much discussion has taken place, and such conflicting opinions been continually found to exist, that I cannot hope that any useful result will be attained by further argument here. I content myself, therefore, with thus briefly stating the principles by which I think the question ought to be decided, and referring to Story, *Conf. of L.* (edit. of 1841), § 335, and several of the sections immediately following, where the decisions in foreign courts of justice, as well as in our own, upon this subject, are collected together and arranged, and commented on with the usual learning and ability of that distinguished jurist.

**Mr. Justice McLEAN.**

I assent to the affirmation of the judgment of the Circuit Court. How an act which impairs the obligations of contracts can be considered constitutional as regards subsequent contracts, and not prior ones, is not within my comprehension. The notion, that such a law becomes a part of the contract, is in my judgment fallacious. Whatever constitutes a part of the contract is inseparably connected \*with and governs it, wherever it may be enforced. [\*312 All other forms and modes of proceeding, which affect the contract, belong to the remedy.

An unconstitutional law has the same and no greater effect on subsequent than on prior contracts. If a State can, in the mode supposed, disregard the inhibitions of the federal constitution, there is no limit to the exercise of its powers. It

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has only to pass an act, however repugnant to the constitution, and, according to the doctrine advanced, it operates as a law upon all subsequent transactions by a presumed assent to its validity. The principle, if carried out, would effectually subvert all restriction on the exercise of State powers in the federal constitution.

Mr. Justice DANIEL.

In the decision just pronounced, so far as it affirms the judgment of the Circuit Court, I readily concur. I concur, too, in the opinion of the majority of the court, so far as it maintains the position, that the contracts sued upon in this case, being essentially New York contracts, could not be discharged by the insolvent laws of Maryland. But to any and every extent to which it may have been intended to assume that these contracts, if properly Maryland contracts,—that is, if they had been made in Maryland, and designed to have been there performed,—should not have been discharged by the insolvent laws of that State, enacted and in force prior to the contracts themselves, I am constrained to express my entire dissent. I hold it to be invariably just, that the law of the place where a contract is made, or at which it is to be performed, enters essentially into and becomes a part of such contract; and should govern its construction, whenever a departure from that law is not so stipulated as to establish a different rule by the contract itself. This principle of interpretation I deem to be in accordance with the doctrine of the writers upon the comity of nations, as we find it extensively collated by the late Justice Story in his learned researches upon the conflict of laws. This rule, moreover, I hold to be in no wise in conflict with the eighth section of the first article of the constitution of the United States, conferring upon Congress the power to establish uniform laws on the subject of bankruptcy; nor with the tenth section of the same article, which prohibits to the States the power of enacting laws impairing the obligation of contracts. On the contrary, it recognizes in the federal government, and in the governments of the States, the correct and complete distribution of powers assigned to them respectively by the constitution.

By a reasonable rule of interpretation, and by repeated adjudications of this court, it is held, that the mere investiture of Congress with the power to pass laws on the subject of bankruptcy would not, *ipso facto*, divest such a power out of the States. The withdrawing of the power from the States  
\*313] would be dependent upon \*an actual exercise by Congress of the power conferred by the constitution, and

upon the incompatibility between the modes and extent of its exercise with an exertion of authority on the same subject by the States. The mere grant of power to Congress, whilst that power remained dormant, would leave the States in possession of whatever authority appertained to them at the period of the adoption of the constitution. These conclusions are in entire harmony with the decisions of this court in the case of *Sturges v. Crowninshield*; in that of *Ogden v. Saunders*, so far as the latter has been comprehended; for whilst it would be presumptuous not to ascribe any perplexity in this respect rather to my own infirmity than to a defect in the work of much wiser men, I must be permitted to say, that I have great difficulty in reconciling the case of *Ogden v. Saunders* with other decisions of this court, or in reconciling it even with itself. These conclusions, too, are in accordance with the very perspicuous opinions of Justices Washington and Thompson in the case last mentioned, and with the opinion of Justice Story in that of *Houston v. Moore*. Yet, if it be asked whether the States can now enact bankrupt laws within the sense and meaning of the power granted to Congress, I answer that they cannot. This reply, however, is by no means a deduction from the terms of the grant to Congress, as expressed in the eighth section of the first article of the constitution. That provision, I maintain, for aught that its language imports, leaves the States precisely where it found them, except so far as they might be affected by an actual exercise of authority by Congress. The States were found in the habitual practice of bankrupt systems; and as long as they should not be controlled in that practice by the action of Congress, they would have remained in possession of the right to continue their familiar practice, so far as the mere language of the eighth section of the first article of the constitution would affect them. But the constitution has proceeded beyond the potential restriction of the section just mentioned, and in so doing has abridged the power it found in practice in the States. It has, in section tenth of the same article, declared that no State shall have power to pass any "law impairing the obligation of contracts"; and in this inhibition, as I hold, is to be found the true limit upon the power of passing bankrupt laws, previously exercised by the States. Bankrupt laws, as understood at the time of adopting the constitution, and at all other periods of time, have been interpreted to mean laws which discharge or annihilate the contract itself, with all its obligations; and if the constitution had stopped short at providing for a discretionary power in Congress to enact such laws, and should have omitted any

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restraint upon the States, having found the latter exerting the power of passing bankrupt laws, it would have left them, by the mere fact of this omission, still with the power, by retroactive legislation, of dissolving and abrogating contracts.

\*314] By connecting the \*power given to Congress to pass bankrupt laws with the inhibition upon the States contained in the tenth section of the first article, all power in the latter to enact bankrupt laws as laws operating upon contracts previously existing has been taken away. But a power to discharge a contract made under a system of laws established and known to all, as public laws are inferred and indeed are necessarily admitted to be,—laws which may permit, nay, which under certain circumstances may command, such discharge,—presents a wholly different aspect of things,—one implying no bankrupt power, no power that is retroactive, and incompatible with either the legal or moral obligations involved in the contract; an aspect of things which, so far from authorizing an infringement, insists upon a fulfilment, of the contract, an exact compliance with its true obligations. To prevent this, then, would be to impair the obligations of the contract, to set up some new and retroactive rule for its interpretation, and thereby to inflict a wrong on a portion, if not on all, of the contracting parties.

To carry into effect the obligations of parties is the perfect right of communities of which those parties are members, and within which their obligations are made, and within which it may have been stipulated that they should be fulfilled; the enforcement of obligations, when intended to be performed according to the laws of other communities, constitutes a right and a duty recognized by the comity existing amongst all civilized governments. The case under consideration being one of a contract, which, though made in Maryland, was to be performed in the State of New York, the Circuit Court decided very properly that it could not be discharged by the insolvent laws of Maryland. But to prevent a misapprehension of the grounds on which this decision of the Circuit Court is approved, by myself, at least, and that, by assenting to that judgment, I may not hereafter be considered as concluded from an application of what is deemed the correct principle, when a case proper for its application may arise, the foregoing explanation has been deemed proper.

Mr. Justice WOODBURY.

The judgment which has just been pronounced meets with my concurrence; but I have the misfortune to differ as to

some of the views that have been expressed in rendering it.

As a matter of fact, the merchandise which is set out as the ground of action in the declaration in this case was sold in New York, by a citizen resident and doing business there, and the note given for it and offered in evidence was delivered to him there. Consequently, in point of law, the contract must be deemed a foreign one, or, in common parlance, a New York, and not a Maryland, contract. 6 Pet., 644; 3 Wheat., 101, 146; 3 Met. (Mass.), 207; 3 Johns. (N. Y.) Ch., 587.

\*The *lex loci contractus*, which must govern its construction and obligations, is therefore the law of New York, unless on its face the contract was to be performed elsewhere. This is the rule in almost every country which possesses any civilized jurisprudence. 16 Johns. (N. Y.), 233; 3 Cai. (N. Y.), 154; Story, Bills of Exch., §§ 146, 158, 168; 2 Barn. & Ald., 301; 1 Barn. & C., 16; Story, Conf. of L., §§ 272-329; 5 Cl. & F., 1-13; 13 Mass., 1; 6 Cranch, 221; 6 Pet., 172; 7 Id., 435; 8 Id., 361; 13 Id., 65; Pet. C. C., 302; 4 Dall., 325; Baldw., 130, 537; 2 Mason, 151. See more cases, in *Toune v. Smith*, 1 Woodb. & M., 115.

As a question, then, of international law, without reference to any constitutional question, such a contract and its obligations cannot be affected by the legislation of bankrupt systems of other States. It is understood that the whole court concur in the opinion, that this reasoning and these decisions would be sufficient to dispose of the present case without going into other questionable matters; and, accordingly, no expression of approbation or disapprobation of former decisions in this tribunal, concerning bankrupt discharges, seems to have been necessary on this occasion.

But as the majority of the court have deemed it proper to express some opinions upon them, it devolves on me the necessity of stating very briefly and very generally two or three of my own in relation to this subject, which in some respects do not accord with those of the majority.

What has been and what has not been decided heretofore in respect to the operation of insolvent and bankrupt discharges, in the various cases which have come before this court, it is somewhat difficult to eviscerate, amidst so many conflicting and diversified views among its judges. But without going into an analysis of them now, and without stating in detail how far my individual opinions coincide or differ with what is supposed to have been adjudicated in each case,

I would say, that, independent of any binding precedents, the true rules on this subject seem to me to be these.

1. That the States possess a constitutional right to pass laws, whether called insolvent or bankrupt, discharging contracts subsequently made, provided no concurrent legislation by Congress exists at the same time on the subject, and that such laws cannot be considered as impairing the obligation of contracts, which are made under and subject to them, and when Congress is expressly empowered by the Constitution to pass similar laws. 12 Wheat., 23; *Bronson v. Kinzie et al.*, 1 How., 311; 2 Id., 612.

2. That such laws are to be regarded as if a part of the subsequent contract, incorporated into it; and hence, that the contract, being construed according to the *lex loci contractus*, should be discharged by a certificate of bankruptcy given to the obligor in the State where the contract was made \*316] and was to be performed. \*And this whether the action on it is brought in that State or another, or in the courts of the United States or those of the States, and whether the obligee reside in that State or elsewhere. Considered as a part of the contract itself, it is inseparable from it, and follows it into all hands and all places. 5 Mass., 509; 13 Id., 4, 13 Pick. (Mass.), 60; 3 Burge's Col. & For. Laws, 876, 3 Story, Conf. of L., §§ 281-284; 2 Kent, Com., 390; 2 Mason, 175; *Towne et al. v. Smith*, 1 Woodb. & M., 115. And though in other States and in other forums it may be a matter of comity merely, in one sense of the word, to respect and enforce foreign contracts and their obligations, yet courts will always do it as right whenever the contracts are valid at home, and not immoral or against public policy elsewhere. 1 Dall., 229; 3 Id., 369; Story, Conf. of L., §§ 331-335; 3 Burge's Col. & For. Laws, 876, 925; 2 Kent, Com., 392; 4 T. R., 182; 5 East, 124; 2 H. Bl., 553; 1 Knapp, 265; *Adams v. Storey, Paine*, 79.

3. That the ancient State insolvent laws, which were often called here "poor debtor's acts," and in England "lord's acts," and usually discharged only the body from imprisonment, instead of the contract (2 Tidd Pr., 978; 6 T. R., 366), were and still are constitutional, whether they apply to future or past contracts. Because they do not interfere at all with the debt due, the contract itself, or its obligations, but merely the remedy on it, or the form of legal process, and thus they should govern in that respect no foreign forums, but merely its own courts, as the local and territorial tribunals who issue the precept or process. 4 Wheat., 112, 122, 209; 6 Id., 131; 12 Id., 213, 272; 2 Kent, Com., 392; *Adams*

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v. *Storey*, Paine, 79; *Campbell et al. v. Claudius*, Pet. C. C., 484; 4 Wash. C. C., 424.

Without feeling justified on this occasion in going more at large into these questions, and some others of an interesting character connected with them, I may be permitted to add, that these rules seem to me to have in their favor over some others at least this merit. They give full effect to State powers and State rights over this important matter, when not regulated by Congress. They produce uniformity among the State and the United States courts. They conform to the practice in other countries, and are easily understood and easily enforced.

## ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

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**\*THE PRESIDENT, DIRECTORS, AND COMPANY OF  
THE COMMERCIAL BANK OF CINCINNATI, PLAINTIFFS  
IN ERROR, v. EUNICE BUCKINGHAM'S EXECUTORS,  
DEFENDANTS IN ERROR.** [\*317]

To bring a case to this court from the highest court of a State, under the twenty-fifth section of the Judiciary Act, it must appear on the face of the record,—1st. That some of the questions stated in that section did arise in the State court; and, 2d. That the question was decided in the State court, as required in the section.<sup>1</sup>

It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment.<sup>2</sup>

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<sup>1</sup> CITED. *Messenger v. Mason*, 10 Wall., 510.

<sup>2</sup> FOLLOWED. *Williams v. Oliver*, 12 How., 124. CITED. *Planters' Bank v. Sharp*, 6 How., 327; *Brown v. Atwell*, 2 Otto, 329.

It must appear from the record that the Act of Congress or the constitutionality of the State law was drawn

in question. *Miller v. Nicholls*, 4 Wheat., 311; *Davis v. Packard*, 6 Pet., 41; *Crowell v. Randell*, 10 Id., 368; *McKinney v. Carroll*, 12 Id., 66; *Armstrong v. Treasurer of Athens Co.*, 16 Id., 281; *Crawford v. Branch Bank*, 7 How., 279; *Wolf v. Stiz*, 6 Otto, 641; *Brown v. Atwell*, 2 Id., 327; *Moore v. Mississippi*, 21 Wall., 636.

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Hence, where the legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the State court was, whether or not some of the provisions of the act of 1824 applied to the bank subsequently chartered, the question was one of construction of the State statutes, and not of their validity.<sup>8</sup> This court has no jurisdiction over such a case.

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Ohio.

The Reporter finds the following statement of the case prepared by Mr. Justice Grier, and prefixed to the opinion of the court, as pronounced by him.

Eunice Buckingham, the plaintiff below, brought an action of assumpsit against the plaintiffs in error in the Court of Common Pleas of Hamilton county, and filed her declaration claiming to recover twenty thousand dollars for bills or bank-notes of the Commercial Bank, of which she was owner, and of which demand had been made of the officers of the bank and payment refused, and claiming interest thereon at six per cent. from the suspension of specie payments, and also twelve per cent. additional damages from the time of demand and refusal. The cause was afterwards removed to the Supreme Court of Ohio, who gave judgment in her favor; and thereupon the defendant removed the case by writ of error to the Supreme Court in bank, by whom the judgment was affirmed, and the plaintiffs in error afterwards sued out a writ of error to this court.

The Supreme Court entered on their record the following

If title to land is claimed under a statute, it must affirmatively appear from the record that such was the case. *Williams v. Norris*, 12 Wheat., 117; it must be set up by way of plea. *Montgomery v. Hernandez*, 12 Wheat., 120.

When the jurisdiction depends upon a decision in favor of the constitutionality of a statute, it must be stated in terms, upon the record, that the statute was drawn in question. *Wilson v. Marsh*, 2 Pet., 245; but the force of this decision is much weakened by *Satterlee v. Matthewson*, 2 Pet., 380, where it is held that although the record should not in terms state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of a State to any part of that Constitution was drawn into question, yet the jurisdiction would be entertained. It is

sufficient if, from the facts stated, such a question must have arisen, and the judgment of the State court would not have been what it is if there had not been a misconstruction of some Act of Congress, or a decision against the validity of the right, title, privilege, or exemption set up under it. *Harris v. Dennie*, 3 Pet., 292; *Craig v. Missouri*, 4 Id., 410; *Worcester v. Georgia*, 6 Id., 515; *Coom v. Gallagher*, 15 Id., 18; *Kerth v. Clark*, 7 Otto, 454. The court will not resort to forced inferences and conjectural reasonings to sustain its jurisdiction. *Ocean Ins. Co. v. Polleys*, 13 Pet., 167.

<sup>8</sup> DISTINGUISHED. *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 144 (but see Id., 154). FOLLOWED. *Lawler v. Walker*, 14 How., 149, 152. CITED. *Planters' Bank v. Sharp*, 6 How., 330.



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certificate, which contains a sufficient statement of the points arising in the case:—

“ And upon the application of said plaintiffs in error, it is certified by the court here, that the said plaintiffs in error, on the trial and hearing of this case in said Supreme Court for Hamilton county, and also in this court, set up and relied upon the charter granted to them by the General Assembly of the State of Ohio, on the 11th day of February, A. D., 1829; which charter contains the following \*provision.—the [318 fourth section provides, ‘that said bank shall not at any time suspend or refuse payment, in gold or silver, of any of its notes, bills, or other obligations, due and payable, or of any moneys received on deposit; and in case the officers of the same, in the usual banking hours, at the office of discount and deposit, shall refuse or delay payment in gold or silver of any note or bill of said bank there presented for payment, or the payment of any money previously deposited therein, and there demanded by any person or persons entitled to receive the same, said bank shall be liable to pay as additional damages at the rate of twelve per centum per annum on the amount thereof for the time during which such payment shall be refused or delayed,’ and insisted, that, by the provisions above set forth, the said plaintiffs in error ought not to be held liable to pay for interest or damages in case of suspension of specie payments, or upon demand and refusal of payment of their notes or bills, at a greater rate than at the rate of twelve per centum per annum, and the court here overruled the defence so set up, and held, that under and by virtue of the act of the General Assembly of the State of Ohio, passed January 28th, 1824, and of the said charter of the plaintiffs in error, the defendants in error were entitled to the interest and additional damages allowed to the defendants in error by the Supreme Court for Hamilton county, as stated in the bill of exceptions. The first section of the said act of the General Assembly of the State of Ohio, of January 28th, 1824, is as follows:—‘That in all actions brought against any bank or banker, whether of a public or private character, to recover money due from such bank or banker, upon notes or bills by him or them issued, the plaintiff may file his declaration for money had and received generally, and upon trial may give in evidence to support the action any notes or bills of such bank or banker which said plaintiff may hold at the time of trial, and may recover the amount thereof, with interest from the time the same shall have been presented for payment, and payment thereof refused, or from the time that such bank or banker shall have ceased or refused to redeem

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his notes with good and lawful money of the United States.' And the eleventh section of which is as follows:—'That when any bank or banker shall commence and continue to redeem their notes or bills with lawful money, the interest on their notes or bills shall cease from the commencement of such redemption, by their giving six weeks' previous notice, in some newspaper having a general circulation in the county where such bank or banker transacts banking business, of the time they intend to redeem their notes or bills with lawful money.' It was contended and claimed in this court, by said plaintiffs in error, that the said act of the General Assembly of Ohio, of January 28th, 1824, as applied to the said provisions of this charter, impaired the obligation thereof, and violated the provisions of the constitution of the United States; which \*319] claim so set up was \*overruled by the court. And it is further certified by the court here, that on the trial and hearing of this case in this court, the validity of the said act of the legislature before mentioned was drawn in question, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligations thereof, and was repugnant to the constitution of the United States, and that the decision of this court was in favor of the validity of the said act of the legislature as so applied."

The cause was argued by *Mr. Stanberry* (Attorney-General of Ohio) and *Mr. Gilpin*, for the plaintiffs in error, and *Mr. Charles C. Convers*, for the defendants in error.

As the case went off upon the question of jurisdiction, only so much of the arguments of the counsel is given as relates to that point.

*Mr. Stanberry*, for plaintiffs in error.

The first question which presents itself is as to the jurisdiction of this court. It is claimed for the plaintiffs in error, that the jurisdiction arises upon that clause of the Judiciary Act of 1789, which provides for the case where the validity of a statute of a State is drawn in question, as repugnant to the constitution of the United States, and the decision of the State court is in favor of its validity.

It appears very clearly in the record, that the validity of a statute of Ohio was drawn in question in the State court, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligation thereof, and that the decision was in favor of the validity of the statute.

The defendants in error are understood to claim, that, inasmuch as this statute was in existence at, and prior to, the

granting of the charter, it cannot be held to impair the obligation of the charter; in other words, that this prohibition in the constitution is to be confined to *retrospective* legislation.

Authority for this distinction is supposed to be found in the opinions of the majority of the judges in *Ogden v. Saunders*, 12 Wheat., 213.

There is no question that, in *Ogden v. Saunders*, the majority of the court proceeded upon a distinction between a statute prior and one subsequent to the contract, holding that a statute in force when the contract is made cannot be said to impair the obligation of the contract, for the reason that such preëxisting statute being a part of the law of the land at the time of the contract, the parties are supposed to acquiesce in it, and in fact to make it part of their contract.

In the first place, it is to be observed of this case of *Ogden v. Saunders*, that the distinction it enforces is opposed to the reasoning of the court in *Sturges v. Crowninshield*, 4 Wheat., 122, and to the language of the court in *McMillan v. McNiell*, 4 Wheat., 209.

\*As a general distinction, applicable to all laws, it certainly is not sound, for it would quite set aside this [\*320 most important restraint upon State legislation. It can only have reference to such laws as provide for the manner of enforcing or discharging future contracts, and which may be said to be in the view of the parties when they afterwards enter into the class of contracts provided for in the previous legislation.

In this view, *Ogden v. Saunders* perhaps settles a just distinction, as applicable to the sort of statute then before the court. The question there was as to the validity of a State bankrupt law, in reference to a subsequent contract. It might well be said, that the parties tacitly adopted and recognized this law, or this mode of discharging their contract, when it was entered into.

But in the case at bar, no such intendment can be made, and it is impossible to suppose that the statute of 1824 was adopted by the parties, or in any way entered into the contract or charter made in 1829. The charter was wholly independent of the statute.

Again; this charter was granted by the State. It does not stand on the footing of a contract between individuals, who are supposed to be bound by the existing laws as to contracts, and to adopt and acquiesce in them. Here the State is one of the contracting parties, and the contract itself is a law. If the charter granted in 1829 provides, as we claim it does, that

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in case of refusal to pay its notes in gold and silver the rate of interest shall be twelve per cent., it surely cannot be intended that the parties submitted themselves to the prior law of 1824, so as to increase the rate of interest upon such refusal to eighteen per cent., or six per cent. in addition to the rate stipulated by the charter. In no sense can it be said that the law of 1824 entered into or became part of the charter. If the charter had been silent as to the rate of interest in the particular case of a refusal to redeem, the general law of 1824 would have settled it, and might well have been considered as entering into the charter and constituting one of its terms, for then there would have been no inconsistency or repugnancy between the general law and the charter stipulations.

It is obvious, then, that the charter is impaired by the law of 1824, when the court add to the twelve per cent. provided for by the charter the six per cent. provided for in that law.

Taking it as granted that a charter or contract is so impaired by a preëxisting law, the case is certainly within the mischief, if it be not within the meaning, of the constitutional prohibition.

A charter is granted by a State, explicitly defining what shall be the consequences of suspension of specie payments, and fixing a certain limit to the liability of the stockholders in that event. This is the contract made between the State and the stockholders. It has no reference to any prior laws, *but is a law in itself*, superior to all other laws upon the subject-matter so provided for by its stipulations. Upon \*321] a case made between the bank and a holder of its paper, a claim is made to recover eighteen per cent. for suspension of specie payments, instead of the twelve per cent. provided by the charter. This claim is founded upon a statute of the State passed five years before the date of the charter. The bank questions the validity of this statute, so applied to its charter, on the ground that it impairs the charter, in adding to the rate of interest fixed for suspension. The court decides in favor of the validity of the statute as so applied; the charter is no protection, and the liability of the bank is extended beyond the terms of the charter.

It may be said that all this is the act or error of the court, not of the legislature; that it is simply an error in the construction of the terms of the charter.

Undoubtedly, contracts are liable to be impaired by the errors of the judiciary. It is not for such errors that resort can be had to this court from State tribunals. If a contract be impaired by the application, on the part of the court, of some

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legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court; but if the contract is impaired by the application of a State law, then the jurisdiction does attach.

The prohibition in the constitution is in terms the most general:—"No State shall pass *any* law impairing the obligation of contracts." This is a clause which does not execute itself, nor is any mode pointed out in the constitution by which the prohibition is to be enforced. It is worked out by the Judiciary Act, by means of a case, and the decision of that case by the highest court of the State. That court must first decide upon the question as to the application of the State law; and the decision must affirm its validity. To bring the jurisdiction of the federal tribunal into exercise, to bring about the condition of things to which the constitutional prohibition applies, the law-making and law-expounding authorities of the State must concur. The law of the State can in no way impair a contract, without the agency of the State judiciary. When the law is so applied, and adjudged to be valid by the State court, as to impair a contract, the case arises under the constitution.

Now, if the constitutional prohibition were confined to State laws, which impaired contracts *proprio vigore*, the argument against its application to subsequent contracts would be very cogent. It might then be asked, with confidence, how can a law *per se* impair a contract not in existence when it was enacted? But we have seen that the case does not arise upon the law itself, nor until the act of the court concurs with the act of the legislature. The instant this double agency unites in the application of a law to a contract, so as to impair its terms, that instant it becomes, in the meaning of the constitution, a law impairing the obligation of the contract.

The constitutional prohibition must be understood as not applying to the law itself, but to its application by the court. What is said \*by the majority of the judges in *Ogden v. Saunders* proceeds on that ground. Mr. Justice [\*322 Trimble, one of the majority, uses this language (p. 316):—

"It is not the terms of the law, but its effect; that is inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution, but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry."

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We are then to understand, from this clear statement of the constitutional prohibition, that it is not necessary to show that the State law is unconstitutional *per se*; that, in fact, it may be constitutional for some purposes and unconstitutional for other purposes, just as it happens to be applied by the court to the particular case or contract. It is not the purpose or intent of the law *ab origine*, but its effect or application by the court, which is to be regarded.

This being so, what imaginable difference is there between its application to contracts made before or after its enactment? None whatever, except in such cases as *Ogden v. Saunders*, where the preëxisting law is of such a character as that the parties to the subsequent contract must have made their contract in reference to it, and tacitly adopted it into the terms of the contract. Such a preëxisting law is, in fact, a part of the whole body of law, which creates and defines the obligation of contracts.

But, with reference to the contract in this case, where no such intendment can be made, where all other laws are set aside by the legislative authority itself in the grant of the charter, which stands as the very law for the very case, what imaginable difference is there in its violation by the application of a preëxisting or subsequent law? At the best, it is a contract violated by a law of the State, not directly and by its terms, but by its effect, as applied to this charter.

Suppose this statute had been subsequent in date to the charter, and the court had then applied it to the charter, so as to impair the express stipulations as to interest; the case would have been clearly within the constitutional prohibition. Now, in the supposed case, if it clearly appeared that the court of the State had misunderstood the law in making such application, if it were manifest that the legislature had no intention, in passing the law, to impair the charter, or in any way to apply it to the charter, would all that oust the jurisdiction of this court, or take the case out of the constitutional prohibition? Surely not. It is the fact, not the intention; the effect and application of the law, not the law itself, or the motive with which it was passed, that we must look to.

\*323] Besides, after the application of the law to the charter by the State tribunal, the organ to expound and apply the State law, it must be taken conclusively that the law was intended to apply to the contract, and no argument, however cogent, would avail against such conclusion.

*Mr. Convers*, for defendants in error.

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The contract, the alleged violation of which by legislative power is here complained of, is the act of incorporation of the plaintiffs in error, passed by the General Assembly of the State of Ohio, in the ordinary form of legislation, on the 11th day of February, 1829. The law of the State of Ohio, by which it is claimed that the obligation of this supposed contract was impaired, is the "Act to regulate judicial proceedings where banks and bankers are parties, and to prohibit issuing bank-bills of certain descriptions," passed on the 28th day of January, 1824. The plaintiffs in error are here to assert, before this court, that the State of Ohio, in passing a law in 1824, impaired, by the "passing" of that law, the obligation of a charter granted afterwards, in 1829; that the contract, although not in existence at the time of the passage of the law complained of, nor for five years thereafter, was nevertheless "impaired" by the prior passing of this pre-existing law!

Two questions, arising from the record, present themselves for consideration:—

First. Assuming that the Supreme Court of Ohio erred in its construction of the two statutes referred to, can this court correct the error?

Secondly. Is there any error in that construction of these statutes which was adopted by the Supreme Court of Ohio, and applied to the case?

I. Can this court correct the supposed error of the Supreme Court of Ohio?

I claim, for the defendants in error, that this court cannot reverse the judgment of the Supreme Court of Ohio, for the errors here alleged against this record.

The clause of the constitution of the United States, under which such reversal is asked, is as follows:—"No State shall pass any law impairing the obligation of contracts." I maintain that this provision applies only to statutes passed after a contract has been made, and which, when effect is given to them, according to the legislative intent, impair the obligation of the contract,—making its terms different from what they were, as previously settled by the parties, or its legal effect different from that which it was declared to be by the laws in force at the time when it was made.

This constitutional provision is plain, and construes itself. The law is valid, unless the passing thereof impair a contract. The inhibition directs itself, in express terms, against the passing of the law, and nothing more. It was designed as a shield against the putting forth of legislative power [\*324 to dissolve the obligations by which parties were bound to

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each other; not to correct the errors or mistakes of the judicial power in their application of laws constitutionally passed. It is the wrongful passing of the law by the legislature, not the subsequent misapplication or abuse of a law rightfully passed, which is forbidden. The provision relates to the state of things at the time of the passing of the law. If the act do not then impair the contract, it is a valid law. If contracts are afterwards entered into, and the State courts improperly apply the preëxisting law to such contracts, it can in no sense be said that the passing of the law by the State impaired these contracts. The effect is matter *ex post facto*. It is an act of the court upon a question of purely judicial interpretation; and upon such questions the party must abide the final decision of the highest tribunal of his State. If the power of the legislature be constitutionally exercised at the time, the act cannot afterwards, by any fiction of relation, be divested of its constitutional character, and become unconstitutional and void. It is the fact, that the law when passed by the State is constitutional or unconstitutional, that determines whether it be valid or void. It is upon the act of passing that the constitutional prohibition operates, and, the act once done, it is not in the power of the future to change the fact, that the law was, when passed, constitutional or unconstitutional. This fact, with its character indelibly impressed upon it, as it was at the time of its occurrence, belongs to the past, and over it the future can have no power.

Again; the prohibition is against passing a law "impairing the obligation of contracts." The very term "*impairing*," here used, shows that the law must have the effect of impairing, when passed, or it does not fall within the prohibition,—it is not an "*impairing*" law. Of necessity, it implies that there must be a contract *in esse*, upon which the law, at the time of its passage, operates,—a contract to be impaired by the passing of the law. The term "*impaired*" incorporates into itself, as of the very essence of its meaning, that there is a subject-matter to be affected,—something to be impaired.

Can it, for a moment, admit of controversy, that the sole object of this provision was a restraint upon that dangerous species of legislation, which, after contracts had been made, interposed to discharge them, or alter their terms, without the consent of the parties,—that it was to preserve existing contracts inviolate against legislative invasion? Beyond this, it was not intended to abridge the power of legislation belonging to the States. In the case of *Sturges v. Crowninshield*, 4 Wheat., 122, Mr. Chief Justice Marshall, speaking of this provision, says,—“The convention appears to have intended



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to establish the great principle that contracts should be inviolate. The constitution, therefore, declares \*that no State shall pass any law impairing the obligation of [\*325 contracts." (p. 206.)

The whole matter of contracts,—what may, and what may not, be the subject of agreement,—the competency of parties,—the form of the contract,—the manner of the discharge,—are all left within the range of State legislation; subject only to the qualification, that when a contract, valid according to the laws in force at the time, is once made, no State shall pass any law to change,—to weaken,—to "impair," in any respect, the obligations by which the parties have bound themselves. If the State have not attempted such interference by passing a law,—no matter what errors the courts may commit in their endeavour to ascertain the meaning of the parties, the terms and obligations of their contract,—the party aggrieved can find no protection, under this clause of the federal constitution. He must look for relief to the constitution and laws of his State, and if they fail him, it is his misfortune, to which he must submit; but such defect in the constitution and laws of the State furnishes no ground upon which he can invoke the interposition of this court, whose function, under this clause of the constitution, is not to supply the defects of State tribunals, but to check any attempt of the law-making power of the State to retroact upon past contracts and impair their obligations. The point is almost too clear for argument, especially since the authoritative exposition of the meaning of this provision afforded by the decisions of this court in *Sturges v. Crowninshield*, 4 Wheat., 122, and in *Ogden v. Saunders*, 12 Id., 213; which, it is respectfully submitted, are conclusive of the question. See also *Bronson v. Kinzie et al.*, 1 How., 311, and *McCracken v. Hayward*, 2 Id., 608. The highest judicial tribunals of the States of Massachusetts, Connecticut, and New York have, in like manner, declared that if the law be in force at the time when the contract is made, it cannot have the effect of impairing its obligation, and is, therefore, obnoxious to no constitutional objection. *Blanchard v. Russell*, 13 Mass., 16; *Betts v. Bagley*, 12 Pick. (Mass.), 572; *Smith v. Mead*, 3 Conn., 254; *Mather v. Bush*, 16 Johns. (N. Y.), 237; *Wyman v. Mitchell*, 1 Cow. (N. Y.), 321. So decided, also, by the Supreme Court of the State of Ohio in 1821, in the case of *Smith v. Parsons*, 1 Ohio, 236. The opinion of the court, pronounced by Judge Burnett, contains a full and able exposition of the principle, that statutes in existence when the contract is made are not within the constitutional prohibition.

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See also *Belcher et ux. v. Commissioners, &c.*, 2 McCord (S. C.), 23; *In re Wendell*, 19 Johns. (N. Y.), 153; *Sebrig v. Mersereau*, 9 Cow. (N. Y.), 345, 346; *Hicks v. Hotchkiss*, 7 Johns. (N. Y.) Ch., 308-313; *Blair v. Williams*, 4 Litt. (Ky.), 38, 39, 43-46; *Golden v. Prince*, 3 Wash. C. C., 318, 319; *Johnson v. Duncan*, 3 Mart. (La.) L. R., 531; 1 Cond. (La.), 161, 162.

\*326] The truth is, the only question as to the impairing effect of statutes that can arise in this case is, whether the act of the legislature passed on the 11th day of February, 1829,—the charter,—impaired the provisions of the act of the legislature in relation to banks passed on the 28th day of January, 1824. The Supreme Court of Ohio declared that the act of 1829 did not impair the act of 1824; that it left it just as it was,—in full operation as to this bank, as well as to other banks. It held, that all that the charter did, in respect to a failure of the bank to redeem its notes, was, not to relieve it of the general liability which attached to all banks, under the law of 1824, but leaving that act in full force, to provide “additional” security that the bank would fulfil its engagements to the public, and so subserve the purpose of its creation. How, then, can this court, in the exercise of the narrow jurisdiction over State tribunals to which it is confined, reverse the judgment of the Supreme Court of Ohio, even if it were admitted that any error had here intervened?

Again; the question being merely a question as to the meaning of two statutes of Ohio, *in pari materia*, when taken together, this court, according to the principle settled by its repeated adjudications, will be guided by the construction adopted by the highest judicial tribunal of the State. The Supreme Court of Ohio simply decided, that when the legislature of that State employs, in relation to a bank, the language contained in the fourth section of this charter, it intends to subject the bank to the provisions of the act of 1824, precisely as if, *in totidem verbis*, it were so expressly declared. In the case of *Elmendorff v. Taylor*, 10 Wheat., 159, Mr. Chief Justice Marshall says:—“This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of that State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the court

of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction of the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the constitution, laws, or \*treaties of the United States." Among the [\*327 many other cases to the same effect are *United States v. Morrison*, 4 Pet., 124; *Green's Lessee v. Neal*, 6 Id., 291.

Now, it would have been unconstitutional for the legislature to have provided by the charter expressly, in so many words, that the plaintiffs in error, on default in the redemption of their notes, should be subject to the six per cent. given by the act of 1824, as well as to the twelve per cent. "additional" thereto, it surely was not unconstitutional for the Supreme Court of the State, to which alone belongs the right of interpreting the language used by the legislature, to hold that the terms contained in the fourth section of the charter did express just that thing,—to declare that the legislature, by the act of incorporation, had said that this bank should be subject to the six per cent. of the act of 1824, as well as also to the twelve per cent. "as additional" thereto.

The Supreme Court of Ohio having decided that the act of 1824 is by the legislature referred to in the charter and made part of it, and the legislature having full constitutional power to do so when it passed the act of incorporation, when it made its contract with the plaintiffs in error, how can it be that the recovery of the defendants in error, in the Supreme Court of Ohio, is obnoxious to any constitutional objection?

The plaintiffs in error ask this court to wrest from the judicial tribunals of the States the right of expounding the statutes of their own legislatures,—to do what Mr. Chief Justice Marshall says "no court in the universe, which professed to be governed by principle, would undertake to do,"—erect itself into a tribunal to correct the alleged misinterpretations of their own statutes by the judiciary of the States.

Unless the construction of the State court make the legislature to do an act which the legislature cannot constitutionally do,—if the legislature might rightfully have done

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precisely what the interpretation of the State court says it did do,—can it be possible that there is any violation of the constitution?

The Supreme Court of Ohio has only decided that the legislature of that State, by the act of incorporation of the plaintiffs in error, did what it had an undoubted constitutional right to do,—incorporated in the charter the provisions of the act of 1824, and added to the penalties which it provided in case of suspension of specie payments.

Indeed, the learned counsel for the plaintiffs in error (who has furnished me with his printed brief) admits the soundness of the opinion in *Ogden v. Saunders*, as applied to a contract to which individuals alone are parties. But he insists that a different rule should obtain where the State is one of the contracting parties,—that, in the eye of the constitution, the properties of a contract as between individuals do \*328] not belong to an act of incorporation passed \*by the legislature of a State. Well, this may be so. But it occurs to me, that this is dangerous ground for him to tread. I had always supposed that the whole basis of the decision of this court in the case of *Dartmouth College v. Woodward*, by which charters were impaled within the protection of this constitutional provision, was, that the charter was similar to,—identical with,—a contract between individuals. To establish this, the arguments of the learned counsel and the reasoning of the court in that case were all directed. Every argument of the counsel for the plaintiffs in error, which tends to make good a difference between a charter and an ordinary contract, directly assails the soundness of this leading case, without which the plaintiffs in error have no place here in this court;—for the foundation of this writ of error is, that this charter is a contract, and as such within the protection of the constitution of the United States.

The learned counsel for the plaintiffs in error also says, that “undoubtedly contracts may be impaired by errors of the judiciary; and that it is not for such errors that resort can be had to this court from State tribunals.” He admits, “that if a contract be impaired, by the application, on the part of the court, of some legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court.” “But,” says he, “if the contract is impaired by the application of a State law, then the jurisdiction does attach.”

The admission amounts to this,—that the State court may impair the contract, by the misapplication of a legal principle, or by the misconstruction of the terms of the contract, and

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yet the case not fall within the jurisdiction of this court. But, if this same error be committed, under pretext of a law of the State, even preëxistent in the contract, the case is within the jurisdiction. According to this, if there had never been any such law in existence as the act of 1824, and the court had rendered precisely the same judgment as that now presented in this record, the error would, by the counsel's own admission, be beyond the reach of this court. There would then be the case of "misconstruction of the terms of the contract,"—of "misapplication of a legal principle,"—which he concedes to be an error for which the judgment is not amenable to this court; and still he says, that because the mistaken "legal principle," which the court below improperly followed, was the preëxisting statute of 1824, instead of some other legal principle, this court may interpose to reverse the judgment. The same judgment might have been rendered by the Supreme Court of Ohio, and any other ground assigned for it than the act of 1824,—although no better in judgment of law than that, both being equally erroneous,—and, by the admission of learned counsel, it could not be impeached in this court for error.

If the State court had the power to render the judgment, it is \*sufficient. The question with this court, whose power over State tribunals is limited, is, whether the [\*329 judgment can stand, without carrying out, in accordance with the legislative intent, a law of the State passed to impair a contract. If it can, then there is no error here for the correction of this court. It is only where a law is passed to operate upon existing contracts, and where the decision of the State court is "in favor of the validity" of such law, that jurisdiction to reverse is vested in this court. It matters not how erroneous, in other respects, the opinion of the State court may be. A wrong ground assumed for its judgment is no cause for reversal by this court, unless that ground be solely that the State court has made itself instrumental in giving effect to a law of the legislature, which, in its enactment, was levelled against an existing contract. *Crowell v. Randell*, 10 Pet., 368; *McKinney et al. v. Carroll*, 12 Id., 66; *McDonogh v. Millaudon*, 3 How., 693.

It cannot be, *in rerum natura*, that the passing of a law can impair a contract, unless the contract be in being when the law is passed. To hold otherwise,—to declare that contracts are, by this provision of the constitution, withdrawn not only from all *future*, but also from all *past* legislation,—is to sweep from the States *all* legislative power over the subject-matter of contracts.

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If the legislature cannot pass laws to operate, *in futuro*, upon charters subsequently granted, then, as it is conceded that corporations cannot be affected by any laws enacted after the grant of the charter, corporations are indeed supreme. Charters rise independent of all law. Well may learned counsel say that they are a "law unto themselves"; for beyond the few meagre provisions embodied in them, they stand exempt from *all* legislative power and control.

The learned counsel for the plaintiffs in error, in his endeavour to maintain the position that the constitution extends to the improper application, by the State court, of a preëxisting law, observes that the wrong is not done by the passing of the law. He says, that the law does not, *per se*, impair the contract; but that it is by the concurrence of the act of the court with the act of the legislature that the thing is affected.

If this be so, what is the result? Now, it was the intention of the legislature, when this charter was granted, that the provisions of the act of 1824 should apply to it, or that they should not apply. If, in legislative intent, the statute of 1824 was to operate upon this bank,—if the fourth section of the charter were, what it purports to be, "additional" to that act,—then the law of 1824, by the terms of the original compact between the State and the plaintiffs in error, became part of the charter. It is parcel of the contract itself; as much so as if set out in it at large. Of course, then, there is no error in the judgment; for, upon this hypothesis,  
 \*330] \*it only enforces the agreement of the parties, according to the terms and true meaning of their contract.

If, on the other hand, the legislature did not design that the law of 1824 should apply, then there could be no "concurrence of the act of the legislature with the act of the court." The "law-making and law-expounding authorities of the State" did not "concur." This "double agency," of which he speaks, did *not* "unite." It was the sole, unauthorized act of the court; an act, too, not only concurring with, but in direct violation of, the legislative intent. The legislative and judicial acts, so far from being concurrent, were antagonist. The wrong complained of is pure, unmixed judicial wrong. So far as legislation is concerned, all is right. That has not transcended its power to strike at the contract. The blow comes from the judiciary alone; and it is not less the sole act of the judiciary, because, to secure its aim, it seizes upon an act of the legislature, and, wresting it from its true design, gives it force and direction never contemplated by the legislature.

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The whole complaint of the plaintiffs in error hath this extent, no more,—that the court of Ohio, on looking into the contract, with a view to ascertain its meaning, mistook its terms, supposing that the parties had adopted, as part of the charter, the provisions of the act of 1824; whereas a right interpretation of the contract, as they claim it, excludes these provisions. That law was applied to the case, because, in the judgment of that court, the parties had, when the contract was entered into, made its provisions part of the terms of the contract. The court simply declared, that, as the contract presented itself to the judicial mind, it was a contract incorporating into itself the provisions of the act of 1824, as claimed by the defendants in error, and not excluding them, as claimed by the plaintiffs in error. It was, in short, nothing more or less than a simple “misconstruction of the terms of the contract”; and upon that, the learned counsel tells us, “a case does not arise for the jurisdiction of this court.”

Again, the act of 1824 relates to the remedy. It is entitled, “An act to regulate judicial proceedings where banks and bankers are parties.” By its express terms, it applies to “all actions brought against any bank or banker.” Regarded in this light, it has been held, in respect to this liability on suspension, applicable even to charters *previously* granted. *Atwood v. Bank of Chillicothe*, 10 Ohio, 526.

Indeed, the case of *Brown v. Penobscot Bank*, 8 Mass., 445, cited by the learned counsel for the plaintiffs in error,—proceeding upon the obvious distinction which obtains between the obligation of a contract and the remedy, as repeatedly declared by this court,—is to the same point. The Penobscot Bank was chartered in the year 1805. In the year 1809, the legislature of \*Massachusetts passed a [\*331 general law, providing, that “from and after the first day of January, 1810, if any incorporated bank within this Commonwealth shall refuse or neglect to pay, on demand, any bill or bills of such bank, such bank shall be liable to pay to the holder of such bill or bills after the rate of two per cent. per month on the amount thereof, from the time of such neglect and refusal.” It was claimed, on the part of the Penobscot Bank, that the act of 1809, “as applied to its charter,” was repugnant to the constitution. The court say, that “if the act upon which the plaintiff relied in this case was unconstitutional, and therefore void, it must be by force of some specific provision in the constitution of the United States, or in that of this Commonwealth. But none such had been cited at the bar, nor was any such known to exist. The incorporation of a banking company was a privilege

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conferred by the legislature on the members. Punctuality and promptness in meeting every demand made on such an institution are essential to its existence; and a failure in this respect, now that bank-bills form, almost exclusively, the circulating medium of the country, is a public inconvenience of great extent, and introductive of much mischief. It was, therefore, a duty highly incumbent on the legislature, by all means within its constitutional authority, to prevent and punish such a mischief, and this the rather, as these corporations received all their powers from legislative grants. The provision made by the act under consideration was equitable and wise, and the community is probably indebted to it for the correction of an evil, which, at the time of passing the law, had increased to an alarming degree. As it had no retrospective effect, there was no ground for complaint on the part of the banks, nor did it militate against any known and sound principle of legislation." (p. 448.)

In the case of *Dartmouth College v. Woodward*, 4 Wheat., 696, Mr. Justice Story says, that "a law punishing a breach of contract, by imposing a forfeiture of the right acquired under it, or dissolving it because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of the contract."

Now, if the act of 1824 can apply to previously granted charters, can there be a doubt as to its appropriate application to *subsequently* granted charters? Such an act, passed after the charter, is held valid, upon the ground that it does not impair any franchise which the corporation may lawfully exercise under the charter. Its object is to prevent an unlawful act,—a violation of chartered duty. It takes away no vested right, unless the corporation has a vested right to disregard the great purpose of its being, a "vested right to do wrong."

In no case is it held that a corporation is exempt from a general law, passed even after the grant of its charter, which is remedial in its character, and operates upon acts *in futuro*, unless the language of the charter imperatively require it.

\*332] How much more cogent is the act of 1824 in its application to charters granted *after* its enactment!

How, then, under the simple clause of the constitution, relied upon by the plaintiffs in error, can the jurisdiction of this court be called into exercise, to reverse, for such an error as this, if error it be, the judgment of the Supreme Court of the State of Ohio?

I take the simple language of the constitution as I find it:—"No State shall pass any law impairing the obligation of



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contracts." The construction of the plaintiffs in error interpolates. As they read the constitution, it declares,—“No State shall pass any law, nor shall its judiciary make any decision, impairing the obligation of contracts.”

In *Satterlee v. Mathewson*, 2 Pet., 413, it is declared, that “there is nothing in the constitution of the United States which forbids the legislature of a State to exercise judicial functions,” and in that case it was accordingly decided, that the constitution did not extend to an act which was of a judicial nature, although in the form of a law passed by the legislature of a State. And this was precisely in accordance with the decision made at an early day in the case of *Calder v. Bull*, 3 Dall., 386. See opinions of Iredell, J., and Cushing, J. With much less reason can it be claimed that a pure judicial act, done not by the passing of a law by the legislature, but by the decision of a court, is within the prohibition of the constitution.

In reply to what is said, as to the case now before the court falling within the mischief which the constitution designed to remedy, I have only to say, that, if the court here incline to go beyond the plain language of the constitution itself, and look into the evils which led to the insertion of this clause, as the history of the times discloses them, ample reasons will be found coming to the support of the position which I maintain. See 4 Wheat., 205, 206.

Besides, in the case of *Satterlee v. Mathewson*, 2 Pet., 381, this court held, that retrospective statutes were not repugnant to the constitution of the United States, unless they were *ex post facto* (using those terms in their restricted sense, as confined to criminal laws), or unless they impaired a contract; although of like mischief with that against which the constitution expressly provided. And it was well remarked by Mr. Chief Justice Marshall, in the case of *Providence Bank v. Billings*, 4 Pet., 563, that the “constitution was not intended to furnish the corrective of every abuse of power which may be committed by the State governments.”

This court will not feel inclined to enlarge the construction of the constitution, in order to abridge the power of legislation belonging to the States, their highest attribute of sovereignty, by any implication extending this constitutional inhibition to all preëxisting laws relating to the subject-matter of contracts. Of such latitudinarian construction, so startling to State power, the end cannot be seen from the beginning. [\*333]

While this court, in the exercise of that high function which sits in judgment upon the validity of the legislative acts of a

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sovereign State, has always shown itself firm to maintain all just rights under the constitution of the United States, it has also shown itself not less careful to guard against trenching, by its decisions, upon the remnant of rights which that constitution has left to the States. So cautious does it move, in the execution of this most delicate trust, that it will not set aside an act of the legislature of a State, as a void thing, unless it appear clearly to be repugnant to the constitution. If its constitutionality be doubtful only, the doubt resolves itself in favor of the exercise of State power, and the act takes effect.

But I submit to the court, with great confidence, that, as to this bank, it is clear that the State of Ohio has not, by the passing of any law, impaired the obligation of its charter contract; and that therefore, upon this record, no case arises to which the constitutional inhibition relied upon by the plaintiffs in error can extend.

*Mr. Gilpin*, for the plaintiffs in error, in conclusion.

The act of the General Assembly of Ohio of 11th February, 1829 (3 Chase's Ohio Stat., 2059), created this corporation for banking purposes, declared its powers, duties, and liabilities, and especially provided for the contingency of its suspending the payment in gold and silver of its bank-notes and deposits, by imposing a penalty of twelve per cent. per annum, from the time of demand and refusal. An act of the 28th January, 1824 (2 Chase's Ohio Stat., 1417), had been previously passed by the same legislature, making several general regulations in regard to banks and bankers in that State; and, among them, providing for the same contingency, by imposing a payment of six per cent. per annum from the time of suspension. This corporation suspended payment, and the defendant in error, holding a large amount of its notes, brought suit in the Supreme Court of Hamilton county, to recover the penalty. Judgment was given in her favor in that court, for the principal of the notes, and also eighteen per cent. interest, subjecting the corporation to the penalty provided by its charter, and then, in addition, to that provided by the act of 1824. This judgment was carried by appeal to the Supreme Court in bank of the State of Ohio, being the highest court of law in that State, and the plaintiffs in error contended that it was erroneous, because it recognized the validity of the act of 1824 as applicable to the charter of the corporation, and thus impaired the obligation of the contract made by that instrument. At the hearing of the case the court were equally divided in opinion on the case

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assigned, and therefore, according to its practice in such cases, the judgment of the inferior court was \*affirmed. [\*334 No opinion was delivered by the Supreme Court in bank, nor either of the judges. No authoritative construction of that court has been given to the act of assembly on the point in question.

The plaintiffs in error contend that this judgment should be reversed by this court, because it is expressly founded on the alleged validity of the act of 1824, as applicable to their charter; and as that charter was a contract between the State and the corporation, its stipulations are thereby changed, and its obligation impaired.

The charter of 1829 is a *contract*, to which the parties on one side are the State of Ohio and those claiming privileges reserved to them by the State, and, on the other, this corporation. It is a contract with mutual benefits, not merely of a general kind, but specific, for the State reserves to itself a certain portion of the profits of the institution. It is such a contract as the constitution of the United States meant to preserve inviolate in its stipulations. It is not a legislative act, operating on the transactions of third parties, or entering into or forming part of their contracts, by the mere force of paramount legislation, but it is an agreement made by the State itself, as a party, for equivalents exacted and received by it from the corporation. It is, even more strongly than in the case of a charitable institution from which the State creating it receives no direct benefit, a contract to which the stockholders, the corporation, and the State are the original parties. "It is," in the words of Chief Justice Marshall (*Dartmouth College v. Woodward*, 4 Wheat., 518), "a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal property has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also." It is a contract "to be held as sacred as the deed of an individual." *Waddell v. Martin*, cited 1 Pet. Dig., 481. The government which is a party to it "can rightfully do nothing inconsistent with the fair meaning of the contract it has made." *Crease v. Babcock*, 23 Pick. (Mass.), 840.

If it is a contract, how are its terms to be ascertained? The charter is the formal and deliberate act of both parties, reducing to literal stipulations what they mutually agree to; laws not introduced form no part of it, except so far as they are general municipal laws regulating all property; the laws that govern contracts between man and man govern this; in

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such a case, would not the written instrument made by and between the parties be taken as the declaration of their liability? Nothing is better settled than that it would be. Vattel, 2, 17, 263; Co. Litt., 147; *Parkhurst v. Smith*, Willes, 332; *Schooner Reeside*, 2 Sumn., 567; *Truman v. Lode*, 11 Adolph. & E., 597; *Kain v. Old*, 2 Barn. & C., 634; *Thomas v. Mahan*, 4 Greenl. (Me.), 516. It is true, that \*335] written contracts do not contain all the municipal regulations necessary to their execution. These are tacitly embraced in them. Not so, however, where the State is a party to the contract, and those regulations would essentially vary its terms. In such a case the subsequent law is substituted for the previous one, just as a subsequent contract between the same individuals, relative to the same subject-matter, would control, modify, or extinguish a former one.

The contract, then, between the State of Ohio and the Commercial Bank of Cincinnati is that contained in the charter passed by the former in 1829, and agreed to and accepted by the latter. What is the obligation of it? The State obliged the corporation to pay a certain penalty in a certain contingency; for that it was to be liable, and for no more; if any law of the State imposed a larger payment in that contingency, the obligation was changed,—impaired. *Sturges v. Crowninshield*, 4 Wheat., 122; *Green v. Biddle*, 8 Id., 84; *Oyden v. Saunders*, 12 Id., 257.

Is there any State law imposing a larger liability than the contract contained in the charter imposes? It imposes a penalty of twelve per cent. for suspension; that is the entire liability. The act of 1824, as construed by the highest court of law in the State, imposes an additional penalty of six per cent. more. This certainly changes and impairs the obligation of the contract between the State and the bank, unless the two laws are so blended together as to be but one regulation; or the mere priority of existence of the act of 1824 makes it necessarily a part of that of 1829; or the constitutional prohibition does not apply to laws passed previously to the contract; or the effect of the law upon the contract must result directly from its own language, and not from its judicial construction or application. None of these exceptions can be successfully maintained in the present case.

The act of 1824 is not blended with that of 1829. The latter is a written instrument, deliberately drawn so as to embrace the whole subject-matter; if the provisions of the act of 1824 were part of it, this would have been so declared. The act of 1829 is not a mere legislative act, prescribing a

municipal regulation affecting citizens or corporations, but it is the agreement of the State itself, for its own benefit, securing what it claims for itself, and imposing the conditions on the other contracting party. If there were clauses in the act of 1824 less favorable to the State, could they be construed so as to affect privileges it might reserve in that of 1829? If the State had agreed, by a general law, in 1824, to advance its bonds to the amount of a million to every bank, and in 1829 agreed by the charter to advance to this bank bonds to the amount of half a million, would it be contended that the former agreement was not superseded by, but added to, the latter? It would be easy to suggest similar contingencies. No. The charter is complete, so far as regards all matters of mutual stipulation between the parties; \*there is nothing in it which requires the act of 1824 to be blended [\*336 with it.

Nor is any inference to be drawn, by legal construction, that the parties intended to include the provisions of the act of 1824 in that of 1829, because it was then in existence, and was not expressly repealed. The facts of the case are at variance with such an implication; so is every legitimate legal inference. Were this a contract between individuals,—and so, in the cases before cited, this court has construed such charters,—unquestionably the legal presumption would be that the new superseded the existing contract. Such, too, is the presumption in legislation; a subsequent provision by law for the same subject-matter is a substitute for a previous one. General laws are so construed; where penalties are imposed, they are not treated as cumulative; where different remedies are given for the same money, both cannot be resorted to, but one or the other must be chosen. *Titcomb v. Union F. & M. Insurance Company*, 8 Mass., 333; *Bartlet v. King*, 12 Id., 545; *Adams v. Ashby*, 2 Bibb (Ky.), 98; *Morrison v. Barksdale*, 1 Harp. (S. C.), 103; *Smith v. The State*, 1 Stew. (Ala.), 506; *Stafford v. Ingersoll*, 3 Hill (N. Y.), 41; *Sharp v. Warren*, 6 Price, 137; *United States v. Freeman*, 3 How., 564; *Davies v. Fairbairn*, 3 Id., 644; *Beals v. Hale*, 4 Id., 53. Besides, there can be no inference founded on a general legal principle which is to prevail against an inference derived from the law in the particular case. The act of 1829 provides for the entire case of suspension of payment of notes and deposits in gold and silver. Even the same court recognized it as so doing, when it was before them on another occasion. *State v. Commercial Bank*, 10 Ohio, 538. The only expression contained in it, which can be cited as at variance with this view, is the imposition of the

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increased interest as "additional damages," which, it is contended, should be construed to be in addition to that imposed by the act of 1824. But the language does not justify this construction; the imposition of the increased interest not merely on notes, but on deposits, which are not provided for in the act of 1824, is inconsistent with it; why double the rate, if not to substitute one for the other? it was to be an increase of interest, not a penalty imposed, as is shown by the express language to that effect in the charter of the Franklin Bank, of which the provisions on this point are the same. 3 Chase's Ohio Stat., 2078. Nor do judicial interpretations of corresponding provisions warrant such a construction. *Hubbard v. Chenango Bank*, 8 Cow. (N. Y.), 99; *Brown v. Penobscot Bank*, 8 Mass., 448; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.), 106; *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1. It is not denied that there are many cases in which laws, existing at the time of making a contract, will be regarded by courts as necessarily forming a part of it. But it is not so where the State is a party to the contract; \*337] where the law to be construed is itself the \*contract; where it is not apparent that the parties must have contemplated such an incorporation of previous laws. 3 Story, Com. on the Constitution, 247; 1 Kent, Com., 395. There is no decision of this court on the effect of an existing State law on a contract made by the State itself; every one relates to cases of contracts between third persons; yet even in these it has always been held that it must appear that the existing law was intended to be embraced, either from a reasonable interpretation of the terms of the contract itself, or from the place where it was made, which justifies the inference of intention that the *lex loci* was to govern. *Sturges v. Crowninshield*, 4 Wheat., 122; *Clay v. Smith*, 3 Pet., 411; *Baker v. Wheaton*, 5 Mass., 509, 511. The whole series of decisions in regard to the effect of State insolvent laws on contracts, and as being considered to form, by implication, a part of them, rests on this view of the subject, as does the application of the *lex loci* to the construction of them.

The prohibition of the constitution had for its object to prevent the obligation of a contract being impaired by any law whatever, no matter whether its passage was before or subsequent to the contract. The inquiry is, Does a contract exist? What is its obligation? Does a law impair it? If there is in existence a contract, valid in itself, such as the parties had a right to make, not embracing by its terms or by just legal implication the provisions of other laws, then any State law that changes or controls it, or can be so applied by

the judicial tribunals of the State as to change or control it, is contrary to the language and intention of the constitutional prohibition, no matter when such law bears date,—no matter whether its operation be prospective or retrospective,—on contracts existing when it was passed, or entered into subsequently. In the first plan of the constitution there was no such clause; it was introduced to prevent any interference by laws of the States with private contracts. It was proposed to restrict this to such State laws as were “retrospective,” but that was not adopted, and the existing limitation was made with a view to reach the declared object,—“a restraint upon the States from impairing the obligation of contracts” in any way. 2 Madison Papers, 1239, 1443, 1445, 1552, 1581. The reference to a future action,—that no State “shall pass” such laws,—relates to the date of the constitution; it is a prohibition future as to that instrument, not to the contract to be affected. No State law, after the constitution should be adopted, was to impair the obligation of a contract; this was the object of the prohibition. *Calder v. Bull*, 3 Dall., 388; *Sturges v. Crowninshield*, 4 Wheat., 206; *McMillan v. McNeill*, 4 Id., 212; *Oyden v. Saunders*, 12 Id., 255.

It is evident, that, if such be the object of this prohibition of the constitution, then to make it effectual it must operate, not only where its violation is the result of the direct language of the law, but \*wherever the law is so applied by that branch of the State government—its judiciary [\*338—which enforces the law, as to produce this result, to violate this prohibition. A legislative act seldom, perhaps never, violates a contract *proprio vigore*; it is the judgment of a court, applying the act to the contract, which does so; the law impairs the contract only by force of the judgment, it is indeed the law that does so, but only because the judicial application of it has given that construction and application to its provisions. If this were not so, then the law would in every case be constitutional, or the reverse, in itself, and not by reason of its application. Yet this will hardly be contended. Suppose a law confers special privileges on a corporation, and a subsequent general law forbids corporations to possess such privileges; the latter law is in itself constitutional, but if the judiciary so applies it as to infringe the privileges of the particular corporation, is it not a violation of the constitutional prohibition? On what other principle do the decisions of this court, in regard to State insolvent laws, rest? They have been held to be constitutional or the reverse, not in themselves, but according to the manner and circumstances to which they are applied by the judgment of

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a court; if applied to contracts made within the State enacting it, an insolvent law is held to be valid; if applied to those made without the State, the identical law is held to be unconstitutional, or, to speak more correctly, the judgment of the court founded upon it is reversed, as making the law violate the constitutional prohibition. When this whole question was so elaborately discussed by this court (*Ogden v. Saunders*, 12 Wheat., 255), no point received more unequivocally than this the concurring assent of the judges; they affirmed the validity of the State insolvent law, as not contrary to the constitutional prohibition in its operation on the contract, because it was made and to be executed within the State that passed the law, and on that ground Judge Johnson placed the ultimate judgment of the court. 12 Wheat., 368. In one case (*Clay v. Smith*, 3 Pet., 411) the contract was made in Kentucky, the suit was instituted in Louisiana, a discharge under an insolvent law of the latter was pleaded and admitted, because it appeared that the plaintiff, though a citizen of Kentucky, had received a dividend from the syndics in Louisiana; had not that circumstance occurred, the application of the law of Louisiana to the Kentucky contract would have been held to impair its obligation. Was this the law itself, or its application, which constituted the violation of the constitutional provision? There is scarcely a prohibition of the constitution that might not be evaded by State laws, if the evasion must arise necessarily from the law itself, and not from its application by the State courts. Cannot a State pass a general law placing certain restrictions on the travelling of coaches and stages, but not referring in terms, or by necessary implication, to the mail-coach, and if the highest court \*339] of the State recognizes \*the law to be valid as applied to such a coach, is not that a violation of the constitutional reservation to the United States exclusively of matters connected with the post-office? Would the decision of the State court be affirmed by this court, or, what is equivalent thereto, jurisdiction over it be declined, on the ground that it was a mere judicial misconstruction of the State law? A State may pass a law requiring, in general terms, the captain of a vessel to adopt certain sanitary regulations on board, to carry certain lights, to steer in a certain way so as to avoid collisions, and impose a penalty for neglect; but if the highest court of the State sustained a suit to recover the penalty, when it appeared that the violation of the law was in the course of a foreign voyage, and not within the local jurisdiction of the State where its authority to enforce police regulations prevails, would not that judgment be subject to the re-



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vision of this court? A State has a right to borrow money; it may pass a law authorizing its executive to do so on the faith of the State; if in so doing he should issue "bills of credit," and the highest court of the State should sustain their legality as founded on that law, would this court refuse to revise that judgment, on the ground that the law itself was constitutional, and that its application to the particular case was a mere act of the court, not contemplated by the State legislature, and therefore not violating the constitutional prohibition?

Again; it is not alone on the language itself of the State law, it is on its construction also by the State court, that the supervising judgment of this tribunal will be founded. The decision of a question arising under a local law of a State by its highest judicial tribunal is regarded by this court as final, not because the State tribunal has power to bind it, but because it has been deliberately held and decided that "a fixed and received construction by a State in its own courts makes a part of the statute law." *Elmendorf v. Taylor*, 10 Wheat., 152; *Shelby v. Guy*, 11 Id., 361; *Green v. Neal*, 6 Pet., 298. We have here a local law of the State of Ohio; referring to the law itself, we find it to contain nothing which impairs the obligation of the contract between the State and the Commercial Bank of Cincinnati, nothing which violates the constitutional prohibition; it has received a construction by the highest State tribunal which makes it a law impairing that contract, violating that prohibition; that construction has therefore become "a part of the statute law," as fully as if it were in terms contained in it; the judgment of the Supreme Court of Ohio is founded upon the law as so construed; this court, in revising that judgment, would not, under its own well-considered decisions, give a different construction to a local law; much less would it do so when the effect would be to sanction, under the form of a judicial proceeding, an infringement of a constitutional prohibition.

The legislation of Congress also seems to have contemplated the enforcement of this constitutional prohibition, where its infringement \*arises from the judicial construction of a State law. The constitution prohibits [\*340 the passage of a State law impairing the obligation of a contract. It leaves to Congress the legislation necessary to enforce this prohibition. How has Congress enforced it? Not by reserving to itself a direct supervision of the State laws; not by subjecting them to a direct supervision of the Supreme Court of the United States; but by requiring that they should first be passed upon and construed by the highest court of the

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State itself, and that, if the judgment of that court so construes them, or gives them such validity, as to make them repugnant to the constitutional provision, then this court may reverse such judgment, and by so doing make void such an application of the law. What could be the object of this act of Congress, if it was not to sanction a revision of a judgment of the highest court of a State, founded upon its construction of a State law,—upon its holding a State law so construed to be valid,—whether that construction was in itself right or wrong, whenever the direct effect of such judgment was to impair, under color of that law, the obligation of a contract?

Even the language of the constitution itself is more comprehensive than if it meant to prohibit an infringement of its provision by a mere legislative "act"; it seems to use the term "law" in a broader sense, as if it was the complete and sovereign action of a State, commenced by its legislature but consummated by its judiciary. In another section, where it draws the distinction between the actions of these branches of the State government (art. 4, § 1), it refers to "public acts" and "judicial proceedings." Did it not mean by a "law" the union of the two? In the clause of the ordinance for the government of the Northwest Territory, intended to embrace the same object as that of the constitution, and adopted by the Continental Congress almost at the same time, it was declared that no such law ought ever to be made "or have force,"—as if any enforcement of it, whether legislative, executive, or judicial, was as much to be guarded against as its formal enactment. 1 Stat. at L., 51.

Is not the case now before the court exactly that which was adverted to by Judge Trimble, as within the intent and operation of the constitutional prohibition (12 Wheat., 316), where a law might in itself produce no effect prohibited by the constitution, yet would do so when applied to a case differently circumstanced? He held that the "only necessary inquiry" was, What was "its effect and operation" in the suit upon the particular contract,—whether that effect was to impair its obligation? What has been the effect and operation of applying the act of 1824 to the suit which has been brought upon this contract of 1829; has it not been to impair its obligation? Such, too, is the whole scope of Chief Justice Marshall's remarks in the same case (12 Wheat., 337), where he denies that the constitutional prohibition is confined to \*341] "such laws only as only \*operate of themselves." He says that the law itself, at its passage, may have no effect whatever on the contract, and asks,—“When, then,

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does its operation (in violation of the constitutional prohibition) commence? We answer, when it is applied to the contract; then, and not till then, it acts on the contract, and becomes a law impairing its obligation." Can language lay down a legal principle more directly applicable to the case before the court than this? can there be any doubt that the principle itself is in entire harmony at once with the language and the object of the constitutional prohibition?

It is submitted, therefore, that there is no circumstance to withdraw this application of the act of 1824 to the charter of the Commercial Bank of Cincinnati from being included within the constitutional prohibition as impairing its obligation. If this has been established, then it is clear that the judgment of the Supreme Court of Ohio, recognizing that act as valid when so applied, may and ought to be reversed by this court; for it appears by the record that the validity of the State law was drawn in question on that ground in the State court, and its validity there affirmed. *Miller v. Nichols*, 4 Wheat., 311; *Wilson v. Blackbird*, 2 Pet., 250; *Satterlee v. Mathewson*, 2 Id., 409; *Harris v. Dennie*, 3 Id., 292; *Crowell v. Randell*, 10 Id., 391.

Mr. Justice GRIER, after giving the statement of the case which is prefixed to this report, proceeded to deliver the opinion of the court.

The first and only question necessary to be decided in the present case is, whether this court has jurisdiction.

To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record,—1. That some of the questions stated in that section did arise in the State court; and, 2. That the question was decided in the State court, as required in the section.

It is not enough, that the record shows that "the plaintiff in error contended and claimed" that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and "that this claim was overruled by the court"; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. Let us inquire, then, whether it appears on the face of this record, that the validity of a statute of Ohio, "on the ground of its repugnancy to the constitution or laws of the United States" was drawn in question in this case.

The Commercial Bank of Cincinnati was incorporated by  
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an act of the legislature of Ohio, passed on the 11th of February, 1829, which provided, that, in case that the bank \*342] should at any time \*suspend payment, and refuse or delay to pay in gold or silver any note or bill on demand, it should be "liable to pay, as additional damages, to the holder of such notes twelve per cent. per annum on the amount thereof, for the time during which such payment shall be refused or delayed." By a previous act of 24th of January, 1824, all banks had been declared liable to pay six per cent. interest on their notes, when they had refused payment on demand, from the time of such demand or refusal, "or from the time that such bank or banker shall have ceased or refused to redeem his notes with good and lawful money of the United States." The only question which arose on the trial of the case was, whether the bank was liable to pay the twelve per cent. in addition to the interest of six per cent. given by the act of 1824, or only the twelve per cent. imposed by the act of incorporation.

Did the decision of this point draw in question the validity of either of these statutes, on the ground of repugnancy to the constitution of the United States? Or was the court merely called upon to decide on their construction?

We are of opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness.

It is too plain for argument, that, if the act of incorporation had stated, in clear and distinct terms, that the bank should be liable, in case of refusal to pay its notes, to pay twelve per cent. damages in addition to the interest of six per cent. imposed by the act of 1824, the validity of neither of the statutes could be questioned, on account of repugnancy to the constitution. But the allegation of the plaintiffs' counsel is, that the statute of 1824 was not intended by the legislature to apply to their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.

But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the constitution of the United States has been decided by the State court to be valid, and not where an act admitted to be valid has been misconstrued by the court. For it is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiffs' charter or not; and if so, it follows, as a necessary consequence, that the

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question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase "additional damages," as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but \*whether the Supreme Court of Ohio has erred in its [\*343 construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

We are of opinion, therefore, that this case must be dismissed for want of jurisdiction.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

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JOHN SCOTT AND CARL BOLAND, PLAINTIFFS IN ERROR,  
v. JOHN JONES, LESSEE OF THE DETROIT YOUNG MEN'S  
SOCIETY, DEFENDANTS IN ERROR.

An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of Congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject.<sup>1</sup>

In order to give this court jurisdiction, the statute the validity of which is drawn in question must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its constitution and laws.

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<sup>1</sup> *S. P. Permoli v. New Orleans*, 3 How., 589.

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If public bodies, not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting. But their measures are not examinable by this court on a writ of error. They are not a State and cannot pass statutes within the meaning of the Judiciary Act.<sup>2</sup>

THIS case was brought up by a writ of error, issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Michigan.

It was an ejectment brought in the Circuit Court for the county of Wayne, State of Michigan (State court), by the Detroit Young Men's Society against the plaintiffs in error, to recover lot No. 56, in section one, in the city of Detroit.

On the trial of the cause, in December, 1841, the plaintiffs below offered in evidence,—

\*344] \*1. An act of incorporation by the legislature of the State of Michigan, passed on the 26th of March, 1836, entitled "An act to incorporate the members of the Detroit Young Men's Society." To the admission of this act in evidence the defendants objected, but the court overruled the objection, and allowed it to be read to the jury; whereupon the defendants excepted.

2. A deed, bearing date on the 1st of July, 1836, executed by Solomon Sibley, judge, George Morell, and Ross Wilkins, judge, purporting to convey lot No. 56 to the Detroit Young Men's Society, the plaintiffs having first proved, by the witnesses to the deed, that, on or before that day, the said Sibley, Morell, and Wilkins were reputed to be, and acted as, judges of the Territory of Michigan, appointed by the authority of the United States.

The act of Congress under which they acted was that of 21st April, 1806, ch. 43 (2 Stat. at L., 398).

To the admission of this deed as evidence, the defendants objected, upon five grounds. But the court overruled the objections, and allowed the instrument to be read to the jury; whereupon the defendants excepted.

The defendants then offered in evidence the following:—

1. A deed from the treasurer of the county of Wayne to John Scott, dated 10th October, 1833, conveying the title for taxes; which deed the court refused to permit to be read in evidence, unless it were first shown that the title had passed out of the United States, and that the same had been regu-

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<sup>2</sup> APPLIED. *Miners' Bank v. Iowa*, Wall., 510. And see *Hay v. Washington &c. R. R. Co.*, 4 Hughes, 343

larly assessed and returned; to which refusal of the court the defendants excepted.

2. A resolution of the governor and judges of the Territory of Michigan, dated on the 8th of September, 1806, that the basis of the town should be an equilateral triangle, having every angle bisected by a perpendicular line on the opposite side, and then proved, by a mathematical calculation, that lot No. 56 was the same as that which was known as lot No. 52 prior to 27th April, 1807; and then offered a resolution of the governor and judges, dated on 13th March, 1807, conveying said lot No. 52 to Elijah Brush.

To all which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants then offered a witness, to prove that he had applied to the governor and judges for information as to what lots were taxable, and that they had informed him that the lot in question was taxable in 1828; to the admission of which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants further offered parol evidence relative to the conduct and declarations of the governor and judges, to which the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

And on the trial of said issue, it further appeared in evidence, \*from the records of the Secretary of State, [\*345 that a legislature of the State of Michigan, duly elected and returned, was organized and duly qualified, under the constitution of said State, on the third day of November, A. D., 1835, and that Stevens T. Mason, having been duly elected and returned, was on the same day duly qualified, and took upon himself the execution of the office of governor under the constitution of the said State of Michigan; that the aforesaid act, entitled "An act to incorporate the members of the Detroit Young Men's Society," was approved by the said Stevens T. Mason on the 26th of March, in the year 1836, and who was at that time governor, acting under the constitution of the State of Michigan; that John S. Horner was Secretary of the late Territory of Michigan, and in the month of July, 1835, acted as governor of said Territory; that he was the last person who exercised the functions of territorial governor of the Territory of Michigan; that the last official act of said Horner, as governor of the Territory of Michigan, in the office of the Secretary of State, is a proclamation, dated in the month of July, in the year 1835, but by reputation it appeared, that the said Horner purported to act as territorial governor of Michigan until some time in the

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year 1836. It further appeared, by the records produced by the late clerk of the late Supreme Court of the Territory of Michigan, that a session of said court purported to have been holden by George Morell and Ross Wilkins, as territorial judges, in the month of June, 1836, and adjourned the 30th of said month. And it further appeared, on the trial of said issue, that Solomon Sibley, George Morell, and Ross Wilkins purported to act as judges of the Territory of Michigan on the 1st of July, in the year 1836. And on the trial of said issue the defendants offered a witness, who was present at the time, to prove to the jury that Solomon Sibley and Ross Wilkins, acting as judges of the Territory of Michigan, held a session of the Supreme Court of said Territory on the first Monday of January, in the year 1837, and of which the clerk of said Supreme Court made no record; to the admission of which the plaintiff, by his attorney, objected, and the court sustained the objection, and rejected said evidence, and the defendants, by their attorney, duly excepted thereto.

And the testimony on both sides being closed and commented upon, and the said court being about to charge the said jury, and to commit to them the said cause, the said defendants, by their attorney, moved the said court, and requested them to charge the said jury, in the words or effect following, to wit:

First. That the act herein before mentioned, entitled, "An act to incorporate the members of the Detroit Young Men's Society," was not of force, or in any wise sufficient in the law to create and constitute of the lessors of the plaintiff a corporation or body politic, in the law, capable to take or hold said lot or premises, nor the title thereof, nor to exercise any \*346] corporate rights or powers in virtue \*or under color of said act, unless the jury should find that the State government of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation.

Second. That from and after the establishment and coming into force and operation of said State government, and of the legislature thereof, the territorial government established by the United States, and previously in full force in and over the Territory of Michigan, ceased, and in law and in fact became abrogated, superseded, and annulled.

Third. That from and after the coming into effect and operation of said State government, the powers, duties, and office of judges of said territory ceased, and became in like manner abrogated and abolished, and by consequence the said Solomon Sibley, George Morell, and Ross Wilkins, as



said supposed judges of said Territory, were no longer, after the said establishment and coming into operation of said government, competent in the law, as such judges of the Territory of Michigan, by said supposed deed by them executed, to convey any right or title in, to, or of said lot No. 56, or the premises in question, to the said lessors of the plaintiff, nor to perform any other of the functions, nor exercise the powers, previously conferred by any act or acts of Congress upon the territorial judges of said Territory of Michigan.

Fourth. But if the said jury should find that the said Solomon Sibley, George Morell, and Ross Wilkins were, on the said first day of July, in the year 1836, severally in the legal exercise of the office of judge of said Territory of Michigan, duly appointed by the United States, and holding office under such appointment, and that they severally signed and sealed said paper, writing, or deed, in the execution of their said offices, according to the act of Congress entitled, "An act to provide for the adjustment of titles to land in the town of Detroit and Territory of Michigan, and for other purposes," approved April 21st, A. D., 1806, then that by consequence it followed and resulted that the said act, entitled, "An act to incorporate the members of the Detroit Young Men's Society," was without authority, and in contemplation of law did not create nor constitute the lessors of the plaintiff on the 26th day of March, A. D., 1836, nor on any other day, a corporation or body politic, and corporation competent to purchase, acquire, or hold the lot in question, or any real estate whatever.

Fifth. That a territorial and State government cannot coexist in any of their respective departments; that if the lessors of the plaintiff were well incorporated, and competent, in virtue of said act of incorporation of the legislature of the State of Michigan, to take and hold the lot or premises in question, then the territorial government of the Territory of Michigan was, at the date of said paper, writing, or deed, under which the lessors of the plaintiff claim title, [\*347  
\*abrogated and at an end, and the governor and judges of said Territory had no legal existence, and said deed is therefore void, and can convey no title in any event; therefore the plaintiff cannot recover.

Sixth. That the paper, writing, or deed under which the lessors of the plaintiff make title to the lot, or premises in question, being a deed of bargain and sale, and not a donation, is void, and can in no manner be the foundation of any title, not being executed by the governor of the Territory of Michigan, as required by the act of Congress, in virtue of

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which it purports to have been made and executed; and therefore the plaintiff cannot recover. All which charges the court refused to give to the said jury, and to which refusal the defendants, by their attorney, then duly excepted; and, on the contrary, the court charged the jury that the lessors of the plaintiff were well incorporated by the legislature of the State of Michigan, and by a body competent so to do, and that the aforesaid deed, under which the lessor of the plaintiff makes title, was well executed in the law, and by those competent in the law to convey title to the lot or premises in question; and that, on the 1st day of July, 1836, there was a governor and judges of the Territory of Michigan, competent to convey title to the premises in question, under the act of Congress referred to in said paper, writing, or deed; and that, under said act of Congress, the said paper, writing, or deed was well and sufficiently executed without being executed by the governor of the Territory of Michigan, or being acknowledged or proved, as required by the law of the time when the same was made, in relation to all the conveyances affecting real estate; to which charge of the court the defendants excepted.

The Supreme Court of Michigan, in March, 1843, affirmed the judgment of the court below (1 Doug. (Mich.), 119), and the cause was brought before this court by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was argued by *Mr. Woodbridge*, for the plaintiffs in error, and by *Mr. Howard* and *Mr. Hand* (in a printed argument), for the defendants in error.

*Mr. Woodbridge*, for the plaintiffs in error, enumerated the following causes of error in the decisions of the court below, viz. :—

That the evidence tendered and offered to be introduced at the trial of said cause by the said plaintiffs in error, in support of the right and title specially set up and claimed by them, under the act of Congress in said record mentioned, as by the said record appears, was rejected, and not permitted to be read and heard on the trial of said cause; whereas, by the law of the land and a just construction of said act of Congress, the same, or some of it, ought to have been admitted and received in evidence on said trial.

\*348] That the matters and things which the said plaintiffs in error moved and prayed the court to give in charge to the jury, as the same in said record are stated and set forth, were not so given in charge to said jury; whereas

the same, or some part thereof, ought to have been so by the court given in charge, and the jurors who tried the said cause so therein instructed.

That the matters and things given in charge to the said jurors at the trial of said cause, and as the same in said record appear, ought not, according to the law of the land, to have been so given in charge, nor the said jurors to have been so instructed.

That, on the face of the record and proceedings aforesaid, it appears that the certain legislative act in said record mentioned, the validity whereof was drawn in question in said cause on the ground of its repugnancy to the constitution and laws of the United States, was decided and pronounced to be valid; whereas, by the laws of the land, the decision in the premises ought to have been against the validity thereof.

This is an action of ejectment brought by defendants in error, in the Circuit Court for the circuit of Wayne county, in the State of Michigan, against the plaintiffs in error, for a lot of ground in the city of Detroit. Exceptions being taken during the trial to sundry decisions of the court, the cause was removed on error to the Supreme Court, the highest judicial tribunal of the State. The several points made were there decided against the plaintiffs in error, and the judgment below (in favor of defendants in error) affirmed. That judgment of affirmance and the whole record is brought by error to this court.

The first testimony sought to be introduced by defendants in error (plaintiffs below) was a private act, appearing to have been passed by the legislature of the State of Michigan, on the 26th day of March, 1836. It purports to incorporate the defendants in error by the name of "The Detroit Young Men's Society"; to vest them with the capacity to acquire and hold real estate, to sue and be sued, &c. The introduction of this private act was resisted, on the ground that this pseudo legislature had no legal existence at the time of passing the act. That at that period, and both before and after, the territorial government established by the United States was in full and legal force throughout the District of Michigan, and that Michigan did not become a "State" until the 27th of January, 1837, some ten months after the date of the act objected to; and consequently that the act was repugnant to the sovereignty, constitution, and laws of the United States, and, as such, of no force and null.

The act was permitted to be introduced and read, and was decided by the State courts to be a good and valid act to in-

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corporate the defendants. To that decision due exception was taken.

Having thus, by the decision of the court, established their title \*to sue, the defendants in error next offered in \*349] evidence the paper purporting to be a deed from the territorial judges, appointed by the President and Senate of the United States, which is set out in the record. Its admission was objected to, on the ground, that, upon a just construction of the act of Congress of April 21, 1806 (which constitutes the territorial governor and judges *ex officio* commissioners or trustees, with power, in the manner and for the purposes it indicates, to convey the title of the United States to those lots, and also to ten thousand acres of land adjacent to the city of Detroit), the joint concurrence of the governor of the Territory in the execution of the deed was indispensable.

Its admission was also objected to, on the ground that the lot in question was not a part of the ten thousand acres mentioned in the act of Congress, which alone the trustees were authorized to sell for money; but a lot within the limits of the town, with respect to which the trustees could dispose of it only by a deed of confirmation to a previous proprietor, or by way of donation to some citizen of the United States who had been resident in the old town at the time of the fire, and who had suffered by the conflagration. There could be no pretence that defendants in error came within that description of persons.

It was objected, also, that the instrument sought to be introduced as a deed was not executed nor authenticated according to the provisions of the ordinance of 1787, nor according to the general law of the Territory. But more especially it was objected, that it appears upon the face of it to have been executed by the United States judges of the Territory on the first day of July, 1836, many months after the State government was, by the same State judges, decided to have come into full operation; and some four months after the defendants in error had caused themselves to be incorporated by a body which assumed to be the legislature of a sovereign State. Assuming that the court would adhere to its own decision, and that, according to that decision, the State government had become fully and constitutionally established on a day prior to the incorporation of defendants in error, it was insisted that the territorial government must *eo instanti* have become abrogated; that the two governments could not exist together; that if the State government had become established, the office of territorial judge, as a

consequence, must have ceased; that whensoever their office ceased, their power as *ex officio* commissioners or trustees ceased also with it; and that consequently their deed was void, as being no longer authorized by the law. These objections were all overruled. The document was received in evidence as a valid instrument to convey the land, and the decisions of the court severally excepted to.

The defendants in error having here rested their case, the plaintiffs in error, whose peaceable possession of the premises had been sufficiently established, then undertook to prove that the same lot had been confirmed and conveyed by the governor and judges of the Territory, in 1807, to "Tod & McGill," inhabitants, merchants, and proprietors of lots in the old town of Detroit before its destruction by fire. That, having thus become the property of individual proprietors, it became subject to be assessed and taxed, and, the tax remaining unpaid, to be sold for the payment of it. That it was so taxed, and according to the law of the land offered at public auction; and that plaintiffs in error became the purchasers, and received a deed for it executed by the officer to that end appointed by the law. [\*350]

In order to establish the important fact, that the title of the lot has passed out of the United States, plaintiffs in error offered and moved to introduce the journals and records of the governor and judges as a board of commissioners or trustees (under the act of 21st April, 1806). Which journals and records purported to show that the "claims of Tod & McGill" had been duly "adjusted," and the lot in question (with others) confirmed to them as proprietors of lots in "the old town." And, also, plaintiffs moved and tendered to introduce proof of the declarations of the board (the governor and judges), formally and officially made in 1828, in answer to the official application of the assessor of taxes for that year (made with the view of obtaining that information which was necessary to enable him to perform his duty as assessor); that the lot in question had been conveyed by them, had become individual property, and was therefore liable to taxation. Plaintiffs in error also moved and tendered to introduce the deed from the officer appointed by the law to conduct the sales of lands for unpaid taxes; the territorial law providing that the deed itself should be evidence of the regularity of the assessment and sale (Laws of Michigan, 1827, p. 378). All the above-mentioned evidence, as from time to time during the trial it was offered, was objected to by the defendants in error, overruled by the court, and those several decisions excepted to. Plaintiffs in error

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then moved the court to instruct the jury on the law as is set out in the record, which motion was in like manner overruled; and the court then proceeded to instruct the jury to the effect stated in the record, to which decisions and charge plaintiffs in error excepted; and upon these exceptions, and in this aspect, the case comes before this court for revision and judgment.

Before commenting more specifically upon the points made in this case, it may be proper to advert briefly to the history and general character of the land-titles at Detroit, as they existed prior to the passing of the act of 1806.

It was about the year 1720, that the French constructed a permanent fortification at Detroit. It was made to constitute one of a line of military posts extending from Quebec, through the country of the lakes, to New Orleans. The population \*351] had already \*become considerable, but no grants of land had yet been issued there. After it became a garrison town, other considerations prevented the issue of such grants. The general policy of the government was to retain the proprietary title to lands in the immediate vicinity of their forts. It was customary, however, for the commanding officers of the garrison to grant possessory rights to occupants of houses and lots; subject always, in any pressing exigency, to be revoked. These permits ultimately came to be considered as substitutes, practically as equivalents, for actual grants. They were bought and sold, and passed by descent. And the instances were rare, if any such ever occurred, in which the occupants were disturbed in their possessions.

Such was the tenure by which lots, houses, and stores were holden in Detroit, when the sovereignty of the country passed successively from the French to the British government, and from that to the United States; and it continued unchanged until the act of April, 1806; upon which act both the parties rest their respective claims of title.

From the time General Wayne (in 1796) received possession of the military post at Detroit, Michigan became a component part of the old Northwest Territory. When that Territory was divided in 1800, it was made to constitute a part of the western division, or Indiana Territory (2 Stat. at L., 58). And in January, 1805, it was erected into a separate Territory, and its seat of government established at Detroit (2 Stat. at L., 309). A few days before the new government provided by Congress for the Territory was to go into operation, the town was totally destroyed by fire. This event, together with the peculiar and unsettled condition of

its land-titles, led to the enactment of the act alluded to, of April 21, 1806, ch. 43 (2 Stat. at L., 398).

Reversing the order in which the decisions objected to were made in the State court, it is proposed, first, to consider the titles of the plaintiffs in error to the lot in question, and the correctness of the decision by which our proof was excluded. 2d. The validity of the deed read in evidence by defendants in error, in support of their claim of title, and the correctness of the decision by which it was admitted as evidence. And, 3d. The validity of that legislative act, in virtue of which the defendants in error claim to have been incorporated, rendered competent to sue, and to acquire and hold real estate in their corporate capacity.

The character of the title of plaintiffs in error has already been alluded to. It is "set up" under the act of Congress of 1806 (2 Stat. at L., 398). The decision of the State court, in effect, is against it.

Having shown the identity of the lot, the plaintiffs in error tendered in evidence their deed for the premises, executed by the officer appointed by the law, and in respect to which the territorial \*statute provides, that the deed itself shall not only be evidence of the sale, but of the regularity [\*352 of the proceedings which terminated in that sale (Terr. L. of 1827, p. 378). This testimony was rejected until plaintiffs in error should first have shown, by competent evidence, that the title had passed out of the United States. Plaintiffs in error then offered in evidence the journals and records of the board (the governor and judges), for the purpose of proving the confirmation and conveyance of the premises to "Tod & McGill," according to the provisions of the first section of the act of the 21st April, 1806.

They further tendered to prove, by the oral testimony of the assessor by whom the tax (in 1828) was assessed, for the non-payment of which the lot was sold, that, in his character of assessor, he had applied himself to the governor and judges for a designation of the lots they had conveyed, for the purpose of enabling him to execute his sworn duties; that the board, without qualification, declared to him that the lot in question, among others, had been by them so conveyed, and that the lot was accordingly assessed for taxation.

The whole of this testimony, being objected to by the defendants in error, was rejected and excluded by the court. The State court probably considered that the deed to "Tod & McGill" was of a higher grade of testimony; and, it is presumed, rested their decision upon that cardinal maxim,

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that "the best evidence must be given of which the nature of the thing is capable."

But it is the reason of the rule which constitutes the rule. And I have seen that reason nowhere better stated than by this court, in the case of *Taylor v. Riggs*, 1 Pet., 596. After stating the rule as above, the court proceeds to say,—“That is, no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents.” 1 Pet., 596.

In England all title-deeds, upon alienation, pass into the hands of the purchaser. This is the long established, and, it is believed, the universal custom, especially in the non-registering counties. Upon descent they go also to the heir, who may coerce their delivery if withholden. The law presumes, therefore, in England, that all title-deeds are in the hands of the proprietor; and if a question occur as to their contents, he, being a party, must produce them, unless he show that they are no longer in his possession or power. In such a case the rule is legitimately applied. But it will be perceived that the reason of that rule does not apply to this case. There may be something like privity of estate, but there is no privity of contract, between plaintiffs in error and “*Tod & McGill*.” Their estate may be *our* estate, but it passed \*353] from them, *\*in invitum*, by mere operation of law; and the law cannot presume that those gentlemen should voluntarily have given to us their title-deeds. The deed, then, not being presumed to be in our possession nor power, we will be permitted by the rules, as well as by the philosophy of the law, to produce secondary evidence of the fact, which the deeds would verify. Thus, in a suit by a widow, for her dower, it was holden by Kent that she need not produce the title-deeds, for the law presumes it not to be in her power. *Bancroft v. White*, 1 Cai. (N. Y.), 190. Nor in such a case is it necessary for her to coerce their production. 5 Cow. (N. Y.), 299; *Adams, Eject.*, 68, n.

But it is not admitted that the journals and records of the governor and judges, in reference to the public trust confided to them by the act of 1806, ch. 43, can be justly deemed as secondary evidence of their public acts. On the contrary, it is respectfully insisted, that they should be deemed primary, and of the highest grade of evidence as to those acts.

Thus, the original book of acts of a surrogate, containing



an order or "fiat" for administration to be granted, is evidence of the issue of letters of administration. 8 East, 188; 13 Id., 234-237. So in a note (Day's edition), 238.

Books of the steward, containing brief minutes of a surrender and admittance (of copyhold estate) are evidence to prove transfer, without producing original conveyance, &c. 16 East, 208.

But a far more authoritative exposition of the law on this point is to be found in 5 Wheat., 424; 4 Cond., 714. The Bardstown trustees were appointed to lay out a town, dispose of lots, &c. The journals of their proceedings were offered in evidence. The court says,—“The trustees were established by the legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved.” So in 4 Pet., 342; 16 Id., 55, 56. This doctrine seems abundantly sustained by other authorities. 3 Dane, Abr., 510; Swift, Ev., 23; Esp., 423; Bull. N. P., 249; 4 Burr., 2057.

And even as between individuals, where there is no public trust, nor official oath, proof of an agreement to convey, united with long possession, will authorize a jury to presume a conveyance. 7 Johns., 5.

And in this connection it may be proper to remark, that all that it was incumbent upon plaintiffs in error to establish was the abstract fact, that the title to the lot had passed out of the United States; it is immaterial to whom; and no question could be made as to the terms of the deed. By passing out of the United States it became private property, and as such subject to tax, and to sale if the tax was not paid.

Our whole testimony was excluded by the State court; and that decision, we insist, is equivalent to a decision against the title we set \*up under the act of Congress; for it admits the truth not only of what *prima facie* appears [\*354 on the proofs like a demurrer to evidence, but also of all that the jury might justly infer from them. Consequently it is insisted, that the question upon this point is brought clearly within the scope of the 25th section of the Judiciary Act, and therefore within the jurisdiction of this court upon error.

2d point. The defendants in error were plaintiffs in ejectment in the State court. Did they, by legal evidence, show their right to possession? It is insisted that they did not; that the deed introduced by them was not sanctioned by the act of Congress, under color of which it was obtained; that the act of Congress was misconstrued, and the deed itself a nullity; and that any gross misconstruction of the land laws of the United States it is competent for this court upon error

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to correct. It has been deemed very necessary that a uniform construction should be put upon the revenue laws. It can hardly be deemed less important, that the same uniformity should prevail in regard to your system of land laws. Nothing, perhaps, more nearly affects the peace, happiness, and prosperity of any country, than that its land-titles should be placed upon a footing of permanency, certainty, and simplicity. There is a strong moral obligation resting upon Congress, and upon those who administer the land laws, that they should cause to be preserved the permanency and the certainty of a system which forms the basis of the titles of the millions of people whose rights to their own domiciles rest upon the action of this government. Besides, the public domain, too, constitutes one of the sources of the revenue of the nation, and its uniform construction should not be less rigorously enforced. I have not been able to discover that the decision in *Mathews v. Zane* (4 Cranch, 382) has been overruled or shaken. In that case the court say,—“’Tis supposed that its object (i. e. of the Judiciary Act) is to give a uniform construction to all the acts of Congress,” &c.

What is said in *Buel v. Van Ness* (8 Wheat., 319) strongly corroborates the doctrine advanced in *Mathews v. Zane*; and the principle which forms the basis of the decision in *Durousseau v. The United States*, seems fully to justify and amply to establish it. 6 Cranch, 318.

In *Willcox v. Jackson* (18 Pet., 516, 517, &c., *Beaubien's case*), the defendant in error, being plaintiff in the State court, had set up a title under the acts of Congress, and the decision was in favor of that title; the law of the court authorizing the admission as *prima facie* evidence of the final certificate of purchase. The court says, that this rule of evidence, rightly construed, is not repugnant to the laws of the United States; but that the decision of the State court was founded in a manifest misconstruction of the land laws. This court then sustained its jurisdiction upon error; and, although \*355] the defendant set up no title in himself, proceeded to \*correct the misconstruction of the State court, and reversed its judgment. If this case do not, in direct terms, reaffirm the doctrine of *Mathews v. Zane*, it at least strongly illustrates its correctness and wisdom. But in the case before the court, both parties claim title under the same act; the decision must necessarily be in favor of the one, and against the other; and, as in the analogous cases of *Ross v. Barland*. 1 Pet., 655, 662, and of *Pollard's Heirs v. Kibbe*, 14 Id., 353, the plaintiff in error, against whose title the State court decided, having brought the case here, the whole case may

properly become the subject of cognizance; the more especially as it seems to be the law of this court, "that a plaintiff in ejectment must show the right of possession to be in himself positively, and it is immaterial as to his right of recovery whether it be out of the tenant or not, if it be not in himself." 9 Wheat., 524. Assuming, then, that "a case consists of rights and claims of both parties," and that the whole case is here, it is proposed next to show that the instrument in writing, purporting to be a deed, and given in evidence against our objection, was not competent to be introduced as evidence of title.

First. Because it was not executed by the governor of the Territory.

Second. Because, on the face of it, it does not purport to convey the lot to any of the persons provided for in the first section of the act of 1806; nor to convey any of that land which the governor and judges were authorized by the second section of the act to sell and convey. As to the first point: whether any power or trust can be properly executed by a bare majority of those upon whom such power is conferred, is sometimes a complicated question not readily solved.

If the power relate to an individual and private act merely, all must concur in the act, unless the instrument conferring the power provide otherwise, as in the case of awards.

If the act to be done be a public act, and merely ministerial, a majority, as a general rule, may be competent to perform it.

If it be a public act, but yet one requiring the exercise of discretion, deliberation, and judgment, and not merely ministerial, all the trustees should be present, that they may respectively interchange their views, reasons, and opinions; and, all being present, though a majority may decide, yet all should join in the execution of the act.

I do not propose to consume time by commenting upon the principles and the authorities which illustrate these distinctions. Such is supposed to be their general spirit, where no variant course is prescribed by the law or instrument conferring the power. 4 Dane, 805, 806; 1 Bac. (Wilson's ed.), 319; 3 T. R., 40, 380; 8 East, 326-328; 2 Id., 244-247; 1 Bos. & P., 229, 241, *n*; 8 T. R., 454. The difference of construction put upon grants of \*power in these different classes of cases can hardly be sought for in any difference of terms, because the same terms are construed differently, according to the character of the power. A literal interpretation of the words used would seem to require the universal concurrence of all the trustees. In cases of public

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trusts, considerations have reference to public convenience probably induced a relaxation of the more literally exact interpretation. But if, in particular cases, from any peculiarity in the terms used to confer the power, or from other considerations suggested by the nature and objects of the power, an intent may be inferred to require such unanimity, the courts would, no doubt, fall back upon the literal construction.

The act of 1806 exhibits, it is believed, a case for the application of these remarks, and prescribes on the face of it its own rule of construction.

The first section of that act points to three distinct objects. 1st. The laying out of the new town. 2d. The adjustment of the claims and possessory rights of resident proprietors, and the execution of deeds to them; and, 3d. The grant of donation lots to that class of resident citizens designated in the section. The proper execution of these powers implied the necessity of vigilance and patient examination, of discretion, and of judgment. But it held out no temptations to avarice, nor called into action any peculiarly elevated sense of moral integrity; and therefore the law says, that "the governor and the judges, or any three of them, may execute those trusts."

But the trust specified in the second section is of a very different character. That section authorizes those gentlemen to sell for money a very valuable property, and to apply the proceeds of those sales, in their discretion, to the purpose of constructing a court-house and jail for the county, in the place of those which had been destroyed by the fire; and all this without the probability of being called to any, or to a very strict, account. The proper exercise of such a trust implied the necessity of the firmest integrity,—of moral attributes so pure as to elevate them above all imputation of sordid or unworthy influences; it implied, too, the necessity of peculiar caution on the part of those conferring it. In the execution of it, the presence, the deliberation, the concurrence of all were important. It will be observed, accordingly, that this power is made the subject of a separate section, and of distinct provision. It will be observed, that the qualifying expression "or any three of them," twice and emphatically repeated, when providing for the trusts specified in the first section, is altogether and *ex industria* omitted in the second. And why is this, unless it be that Congress intended to vary the rule, and to adopt the more rigid, literal, and better-guarded construction? It is contended, then, that no act of sale—no deed of conveyance, unless it be for some purpose

provided for in the \*first section—can be of any validity, unless concurred in and executed by all the members of the board. [\*357]

This view is strengthened by what has always been the practical construction, as is contended, put upon the statute before the period when the deed objected to was executed. Not an instance before can, it is believed, be found, where any deed, granted in execution of any of the powers defined in either section of the statute, ever before emanated without the signature of the governor or of the acting governor of the territory.

The governor and the judges were the heads, respectively, of two great departments of the territorial government. In the conferring upon those officers, jointly, the power of adopting laws for the territory, the ordinance of 1787 uses words of similar qualification. That high power is granted to the governor and judges, "or a majority of them." But it has always been deemed indispensable, that, in order to give validity to such laws, the governor must have concurred in their adoption; the qualification, "or a majority of them," having always been construed as having reference to the judges only,—the last antecedent. And in the grant of the powers specified in the first section of the act of 1806, ch. 43, it seems probable that Congress had reference to the devolution and the limitations of the powers conferred upon the same classes of officers, acting in the same territory, as defined in the ordinance of 1787.

But however this may be, it is respectfully insisted, that the deed objected to—being a deed of sale, and not a deed of confirmation nor of donation—is fatally defective, being without the signature of the governor.

But, secondly, the deed is objected to, because it does not purport to convey said lot to any of the persons provided for in the first section of the act of April 21, 1806, ch. 43; nor does it purport to sell and convey any of the land which the governor and judges were authorized to sell and convey by the second section of the act.

It is manifestly clear, that the defendants in error do not come within the description of either of the classes of persons mentioned and provided for in the first section of the act. The only power conferred by the second section is that of disposing of the lands comprised within the "10,000 acres adjacent to said town," by sale, and of applying the proceeds as in that section is provided. Now, the lot in dispute is not a part of the 10,000, but is in nearly the middle of the town (see map of the city of Detroit, in 5th vol. of State Papers,

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p. 494), and constitutes, beyond a doubt, one of those lots which should have been confirmed to its ancient proprietor; and if not claimed by such proprietor, then it could only have been conveyed as a donation lot, in conformity with the act. And if it be said that these things do not sufficiently appear on the face of the deed, then it may be replied, that that very omission constitutes a defect in the deed, which should be \*358] esteemed fatal. The \*authority conferred upon the governor and judges was an authority not coupled with an interest. Such an authority must not only be strictly pursued, but it must appear on the very face of the transaction to have been strictly followed. Under the first section no deed is competent, except it be a deed of confirmation or of donation. Under the second section no deed is competent, except it be for a part or the whole of the 10,000 acres; such deed must be executed by the governor and by the judges. It must, in either case, purport to convey the right and title of the United States, and not the title of the governor and judges; or of the judges, as this does. If it be for a part of the 10,000 acres, it should state that fact. The deed is not for a defined tract, but for so much of said lot as had not been previously conveyed by their predecessors. It is not acknowledged: it is not authenticated according to the ordinance of 1787, nor according to the *lex temporis*. It bears evident marks of imperfection, haste, and crudity. "It lacks substance, and wants form," and ought not to have been read in evidence.

But, thirdly, it is most of all and signally defective, in that it purports to convey the lot to such as are not in the law competent to acquire, nor to hold real estate, and to such as have no title to sue.

That there must be a grantee, in order to constitute a grant, is a proposition not likely to be contested here. "That a patent thus made" (after the death of the supposed patentee) "passes no title," says Mr. Justice Catron (12 Pet., 298), "is true in the nature of things; there must be a grantee before a grant can take effect; and so this court held in *Galt v. Galloway*" (4 Pet., 345), "and *McDonald v. Smalley*" (6 Pet., 261).

Was there, then, a grantee, capable of taking under the deed read in evidence in the State court?

In order to establish the affirmative of this proposition, the defendants in error introduced what purported to be an act of the legislature of the State of Michigan, of the date of March 26, 1836 (Laws of Mich. for 1836, p. 165), constituting them a body politic and corporate, &c., as stated in the record.

If defendants in error were by that act duly incorporated by the name they assume, they were competent to acquire real estate; if not so incorporated, they were incapable of receiving it, and their deed is void. If they were thus duly incorporated, they were competent to sue; if not so incorporated, they had no title to sue. The validity of that act was therefore necessarily drawn into question.

To the introduction of this document, as a private legislative act, to suffer it to be read as the law of the land, it was objected that it was not passed by any competent authority, and that it was repugnant to the constitution and laws of the United States. It was, nevertheless, admitted to be read in evidence, and the defendants in error were, by the same State court, declared to have been duly \*incorporated, &c.; [\*359 to which decisions exceptions were taken. The whole matter resolves itself into the single question, whether, on the 26th of March, 1836, Michigan was an independent State, and an admitted member of the Union? If, by her own spontaneous movement; if, by assuming that name and character, she were capable of constituting herself such, without any action on the part of the national government, then she undoubtedly constituted at that period one of these United States. But if the action of Congress were necessary in the matter; if it appertain to Congress; if it be the exclusive prerogative of that body to admit new States into this Union, then we have a right to insist that she did not become an independent State, nor an admitted member of the Union, until, by act of Congress of the 26th January, 1837, she was formally declared to be such. (See 5 Stat. at L., 144.)

It cannot be necessary here to refer specifically to that clause in the constitution which vests this power in Congress. But it is understood to be assumed, on the part of the defendants in error, that in virtue of the stipulations contained in the fifth of the articles of compact, set out in the ordinance of July 13, 1787 (1 Stat. at L., 51), Michigan became an admitted member of the Union from the time her population amounted to 60,000, and had formed a permanent constitution and State government. The terms of the ordinance provide, that when these contingencies shall have happened, the new States there spoken of "shall be admitted by their delegates into the Congress of the United States on an equal footing," &c. It will not escape notice, however, that before such admission can be effected, other and preliminary measures must be determined upon by Congress.

The boundaries of three of those new States are defined, but subject to be varied, if Congress should deem it expedient

to constitute more than three. In the event of there being more than three, the northern boundaries of the three are defined. But whether north of the three, there shall be established one or two additional States, and what shall be their boundaries respectively, are questions left open for the subsequent and future determination of Congress. The further action of Congress on those points, therefore, seemed not only competent, but indispensable, before it could become possible that Michigan should be admitted.

The leading purpose of these "articles of compact" unquestionably was, to establish on a permanent footing over those extensive regions the great principles of freedom and well regulated liberty. How far that purpose will have been attained, future ages will decide. But another and a less disinterested purpose was also had in view; and that was, to induce the more early settlement of the country, and of course to make it a more ample and immediate source of revenue.

To that end, the promises contained in the ordinance were holden out as inducing and stimulating motives to all who might be disposed to remove and buy there.

\*360] \*But afterwards it pleased the whole people of the United States to abolish their government, and to abrogate the old articles of confederation. A new constitution was adopted, an entirely new form of government was established, which took the place of the old one. A literal conformity with the stipulations alluded to became, therefore, neither desirable nor possible. The Congress of the confederation consisted of but one chamber. The votes taken in it were by States. It possessed little power, except that which was merely advisory. It was rather a hall of ambassadors, than a legislative body. Such was the body into which, "by its delegates," the new State was promised admittance; and that body has ceased to exist. But those who framed the new government were too wise and too just to disregard the stipulations and engagements the old government had entered into. They provided, therefore, for meeting those engagements, and fulfilling those stipulations, so far as that could be properly done, consistently with the plan and with the leading principles of the new constitution. They deemed it expedient and wise to vest in Congress exclusively the power to admit those new States into the Union, whenever, in the exercise of a wise and just discretion, the exigency might seem to demand it; and they imposed upon the Congress the moral obligation of conforming to all the *bond fide* engagements of the old government, so far as it might be done consistently with the public good, and the paramount



obligations of the new constitution. To have gone further might not have been wise. How far the provisions of the ordinance of 1787 would have executed themselves, if the government of the confederation had continued; and, if Congress had determined the number of the new States, and defined their boundaries, how far, by the mere force of the stipulations in question, each new State, as it should successively have acquired the requisite population, would have become a member of the Union without the further action of Congress, it is, perhaps, unnecessary to inquire. It may be remarked, however, that to admit a State into the Union implies the performance of some political act; that political act could be executed by Congress only. The form of expression used implies that at some future time that act shall be done; and can any more conclusive inference be drawn from the whole matter, than that an imperious moral obligation is devolved upon Congress to perform the act? But whatever speculations may be indulged as to the effect of the stipulation, had the government continued unchanged, it would seem most unreasonable to suppose, that, under the new constitution, it can by its own force operate as an actual admission of the State without the further action of Congress. That body, with whom the exclusive power remained, had not yet determined whether there should be one or two States north of the southern extremity of Lake Michigan. It had not yet acted upon the subject of the boundaries of such State or States, and without such \*previous [361 action, how is it possible, without a gross encroachment upon the acknowledged prerogatives of Congress to constitute, by the gratuitous movement of the people of the Territory, such State or States? Nor is it difficult to suppose that considerations other than those already alluded to might exist, which would render it just and expedient to suspend for a time the exercise of its power to admit a new State, which, having its sixty thousand inhabitants, should apply for admission. There may exist a difficulty with a foreign power in relation to boundary, which prudence may require the previous adjustment of. The constitution requires that the representation in the House shall be in proportion to the population of the different States, and be regulated by a uniform ratio. (The exception to this rule having reference manifestly to two of the original thirteen.) The ratio of representation being fixed then at a larger number than sixty thousand, how, without violating this most essential and vital principle, and thus doing great injustice to the older States, can Congress admit such new State, while its popula-

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tion falls short of that required to constitute one election district?

The true principle would seem to be, that every ordinance, law, stipulation, and contract made prior to the constitution must thenceforward be construed and taken in subordination to it. That constitution is the paramount law, and must prevail over every law or contract which conflicts with it. By that constitution, the power to admit new States is vested exclusively in Congress. It is altogether a political power; and for its proper exercise there is no other guaranty than will be found in the honor, wisdom, and moral sense of that body. That power has been exercised. By the act above referred to, of 26th January, 1837 (5 Stat. at L., 144), Congress, by solemn declaration, announced that Michigan was admitted as one of the sovereign and independent States of the Union. The authority for performing this political act,—for making this legislative declaration,—is to be found in the third section of the fourth article of the constitution. Congress may “make all needful rules and regulations” respecting the Territories, and Congress may establish and admit into the Union “new States”; and having thus the power, their execution of it is beyond the control as well of the Territories as of all other departments of the government. The history of each of the Territories, and long continued practical construction, sufficiently sanction this proposition.

Michigan was originally a part of the old Northwest Territory. Without its consent, it was severed from that Territory, and made to constitute a part of that of Indiana. (2 Stat. at L., 58.) In like manner, and without being consulted, it was, in 1805, erected into a new Territory (2 Stat. at L., 309), and its political organization and government totally changed; being thrown back from the second to the first \*362] grade of colonial government under the \*ordinance of 1787. Many successive changes in its fundamental law were afterwards, in a spirit of great kindness, but in the exercise of a power unqualifiedly dictatorial, made by Congress. (3 Stat. at L., 482, 722, 769.) Nor is it known that the competency of such arbitrary legislation was ever questioned. Its civil, its criminal, and its political codes were all alike the subjects of frequent and habitual legislation by Congress. And inasmuch as it would seem manifest that the ordinance of the confederation of July 13, 1787, cannot have the effect, *proprio vigore*, to constitute of Michigan an independent State of the Union, and as, from the foundation of the government, Congress has habitually exercised a sovereign control over the destinies of its Territories, upon what

basis can rest the pretension that Michigan could, of her own free will, throw off the colonial government established for her by Congress, erect herself into an independent and sovereign State, and *nolens volens* force herself into the Union?

The Legislative Council of Michigan, as it existed in 1834-35, was constituted by Congress. All the power it possessed was derived exclusively from the grant of Congress. It was appointed to uphold, and, within the sphere prescribed by Congress, to administer, the colonial government Congress had established; and to that end the official oaths of its members were administered to them. This same Legislative Council, under the lead of the youthful and ardent-tempered Secretary, who then, in the absence of a commissioned governor, personated the sovereignty of the Union in the executive branch of our territorial government, commenced a course of measures, with a view to subvert and abolish that very government which they had been appointed and sworn to administer, and on the 26th January, 1835, passed an act providing for the election and assembling of delegates to form a constitution and State government; and in the same act prescribed the boundaries within and over which their new State should extend. How far it consisted with good faith, with their own official power and duty, and their oaths of office, thus to undermine the very basis of their political power,—thus to subvert a government to which alone they could look for whatsoever political power they possessed or could exercise,—it would be useless, perhaps, now to inquire. The act has subverted its purpose, and has become extinct; and whatsoever has followed in no wise rests on a foundation so frail. The delegates invoked assembled in May, 1835. They devised the form of a constitution and State government. They defined the boundaries within which it should extend. They demanded of Congress, in proper and set phrase, that their proceedings should be sanctioned and confirmed; and that Michigan, thus constituted, should take her place as a recognized member of the Union. In the mean time, and without waiting for the action of Congress in the matter, a majority of those delegates determined to carry their new \*government into immediate effect. Elections, therefore, were holden, [\*363 thinly attended to be sure, but they were holden, and a nominal governor and legislature were declared to be duly elected.

In the month of November, 1835, these functionaries were assembled. If Congress were to accede to the demands of the convention, it was expedient that the legislature should

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be ready to act; they therefore continued in session during the winter. In this period of uncertainty and solicitude, they prudently avoided definitive action in all very important matters; but having a due regard to the importance of an outward show of confidence in their position, they busied themselves in passing acts for laying out new roads, organizing new townships, creating new corporations, and in operations like those. It was at this period that they amused themselves by settling the details of the law to incorporate the defendants in error, the validity of which is now brought into question.

In the mean time, were the demands of the convention acceded to? Far from it! Considering the admission of new States, and by consequence the adjustment of their boundaries as political matters altogether referable to itself, the Congress deemed it proper to exercise its own judgment upon them; and having regard to its own construction of the Constitution of the United States, and of the obligation and meaning of the articles of compact of 1787, rejected, wrongfully perhaps, but rejected, the demands of the Michigan convention. What remained to be done? Why, if the politicians of Michigan had no right to cast off the government Congress had prescribed for them at pleasure, and erect themselves into an independent and sovereign community, nothing remained for them but to submit, with what grace they might, to the authoritative decision that their movements were not sanctioned, and that their acts were without authority. To continue, in short, as they had continued, under the territorial government of the United States, until, moved by its own sense of right, policy, and justice, Congress should choose to admit the Territory into the Union as an independent State, with such dimensions and boundaries as it might prescribe.

The State boundaries, as the same are prescribed by the Legislative Council by its act calling the convention (of January 26, 1835), as well as those adopted by convention, comprise a strip of country several miles in breadth, extending along the whole base of the peninsula. It comprehends towns, villages, and cities. It contains a country of unsurpassed beauty. It contains points having commercial advantages unequalled, except by those of Buffalo, by any throughout the whole region of the Northwest. That strip of country Congress has annexed to Ohio and Indiana respectively. On the other side, Congress has deemed it proper to add an extensive region, having an area of land and water

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far \*greater than is contained in the whole of the peninsula! And thus changed in her geographical position, [\*364 dimensions, and people too, thousands of those who assisted in forming her organic law having been cut off on one side, and unknown members of such as did not so participate added on the other, with her identity gone, but with her name preserved, the new State is declared by Congress, on the 26th of January, 1837, to be admitted as one of the States of the Union. (5 Stat. at L., 144.)

If the people of Michigan, through the means of its convention and the Legislative Council accorded to them by Congress, had the right to throw off the laws of the United States, organizing its government at pleasure, and erect themselves into an independent government, then Michigan, with the dimensions her convention prescribed for her, became an independent State in November, 1835.

If the sovereign power of legislating for that Territory, and of admitting it as a new State, rested alone in Congress, then Michigan, with dimensions totally variant, became an independent State and a member of the Union on the 26th day of January, 1837, and not before.

Will it be said that her recognition by Congress, in 1837, as a State, will have relation back to the period when she declared herself an independent community, and constitute of her a member of the Union as from November 2d, 1835? What, then, will be the condition of those officers who, deriving their authority directly or indirectly from the general government, executed in the mean time those laws which, by express enactment, or by the sanction of Congress, had become the laws of the district? Were they all usurpers, all trespassers? And the judges, too, appointed by this government,—will all their adjudications and decrees have become void, and those who executed as well as those who pronounced them become liable, both civilly and criminally, for an usurpation which is against the peace and dignity of the new-born State?

The right of the United States to the "Western posts" accrued from the treaty of 1783. They were not delivered until 1796. Shall that delivery have relation to the period when the right accrued? What, then, will become of the contracts made, the rights accrued, the descents cast, judgments rendered in the interim? Are all void, and those who exercised authority trespassers by relation?

Relation is one of those fictitious devices in the law which never shall be permitted to work a wrong to strangers; 3 Cai. (N. Y.), 261; 4 Johns. (N. Y.), 230; and it illy accords

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with the nature and purposes of that device that it should be so applied. *Butler & Baker's case*, 3 Co., 29. The explicit declaration of Congress can hardly be carried back by relation.

In the case of *Owings v. Speed et al.*, 5 Wheat., 420; 4 Con. R., 714, it became proper to decide when the present \*365] national \*government took the place of that of the confederation? This court on that occasion say, that "both governments could not be understood to exist at the same time; the new government did not commence until the old one had expired." Referring, then, to the action of other departments of government,—to journals, records, official reports, and to contemporaneous history,—the court determines that the old Congress continued until November, 1788; the old government potentially until March 2, 1789; and that the new government then commenced. Although it is not admitted, especially in view of the clauses in the constitution referred to, that any other than the legislative department of the government can control, or in the smallest degree affect, the action of Congress in this matter, yet it is with much satisfaction that reference is made to the clear and admirably expressed views which were taken on this subject by the executive department of this government; I allude to a communication from the State Department of the 8th of October, 1835, and to be found in House Doc. No. 7 of the First Sess. 24th Congress, pp. 92, 93.

From the views thus presented to the court, it will have appeared very manifestly that the validity of the act incorporating the defendants in error must necessarily have been brought into question on the score of its repugnancy to the constitution and laws of the United States. At the threshold of their case it was incumbent upon them to establish their right to sue by the name they assumed. This could be done only by showing a valid act of incorporation. The decision of the State court was in favor of the validity of that act, and thus the case is brought within the words, and the spirit too, of the twenty-fifth section of the Judiciary Act.

If the legislature of a State should pass any act violating the constitution or the laws of the United States, this court would pronounce such act to be void; and that, in passing it, such legislature had transcended those limits, which all the States, by the constitution of the United States, had prescribed for it; that in respect to such excess of authority, the legislature was as no legislature, and its proceeding *coram non judice*. If the positions assumed in this case be warranted

by the constitution of the United States, can the court fail to pronounce a similar judgment?

*Mr. Hand*, for the defendants in error.

That part of *Mr. Hand's* argument which related to the question of jurisdiction was as follows.

This cause comes into this court from the Supreme Court of the State of Michigan, to which court it had been carried by a writ of error from the Circuit Court of said State for the county of Wayne. It was an action of ejectment for a lot in the city of Detroit. The defendants pleaded the general issue: verdict and judgment for the plaintiffs, the present defendants in error.

\*At the trial, numerous exceptions were taken by the defendants, and a bill containing said exceptions, [\*366 duly sealed, which bill of exceptions is embodied in the record, sent up to this court. The Supreme Court of the State affirmed the judgment of the Circuit Court for the county of Wayne. The defendants in error allege and insist that there is nothing upon the record sent up whereby this court can entertain jurisdiction in this cause; which it is believed can be conclusively shown. By reference to the abstract of the cause presented by the defendants in error, and the record in this cause, it will appear that at the trial of this cause the defendants in error, the Detroit Young Men's Society, claimed to have been incorporated by an act of the legislature of the State of Michigan, approved March 26th, 1836, entitled, "An act to incorporate the members of the Detroit Young Men's Society" (Sess. L. of Michigan, 1836, page 165). To the admission of this act in evidence, the plaintiffs in error (then defendants) objected, denying the existence of the State of Michigan at the date of the law, and thus denying the valid existence of the act of incorporation itself. The court overruled the objection, and the party excepted. The subject-matter of said exception does not come within the provisions of section 25, ch. 20, of the Judiciary Act of 1789. An attempt may be made to bring it under the second clause of said section. Under that clause, there must be "drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States." Here was produced an act of the legislature of the State of Michigan. The defendants in the court below objected, not that this statute of the State of Michigan was repugnant to the constitution, laws, or treaties of the United States, but that it was not a law of a State.

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It was the existence of the State that passed the law which was denied, and not the authority or power of a State to enact such a law. The objection was, that the act produced had not the sanction or authority of a law of a State, and not that, being a statute of a State, it was repugnant to the laws, &c., of the United States. Certainly this is not within the second clause of section 25.

Mark what is explicitly required by the clause to give the court jurisdiction. First, there must be a statute of a State. Secondly, the authority of such statute must be drawn in question on the ground that it is repugnant to the constitution, &c., of the United States. To any thing but a statute of a State, or to any objection to such statute but that of repugnancy to the constitution, &c., of the United States the clause does not apply.

The act of 26th March, 1836, incorporating the Detroit Young Men's Society, was or was not a statute of a State. If it was not a statute of a State, then by no possibility could the second clause of section 25 have any bearing upon it. If \*367] it was a statute of a \*State, then Michigan at the time of its enactment was a State, and the only objection made at the trial, to wit, that Michigan was not at the time of the enactment of said act a State, is summarily disposed of.

Again, if said act was a statute of the State of Michigan, then at the trial in the court below its validity was or was not questioned on the ground of its being repugnant to the constitution, treaties, or laws of the United States. If its validity was not questioned on that ground, then it is not within the provisions of section 25. If its validity was questioned on that ground, then it is within said section. But the validity of said act was not questioned on the ground that said statute was repugnant to the constitution, treaties, or laws of the United States; therefore this court has no jurisdiction, by virtue of the matters premised. It may be remarked, that the term *repugnant* is a technical term, of a peculiar, ascertained, and known signification, which signification it bears as it occurs in section 25 of the Judiciary Act. A statute is repugnant to the constitution, treaties, or laws of the United States, when its subject-matter, terms, and provisions are opposed to, and inconsistent with, the subject-matter, terms, and provisions of such constitutions, treaties, or laws, so that they cannot both stand together. Said act (section 1) incorporates the defendants, "for the purpose of moral and intellectual improvement." It confers a common name, a common seal, perpetual succession, capacity to sue



and be sued, and the right to acquire and hold property to the amount of \$25,000. Section fifth reserves to the legislature a right to alter, amend, or repeal the said act, by a two-thirds vote. Such are the simple and ordinary powers and franchises conferred by said act. The utmost captiousness could find nothing in it in the smallest degree repugnant to the constitution, treaties, or laws of the United States.

The exception taken,—that Michigan was not a State on the 26th March, 1836, *ergo*, the said act not valid,—might peradventure have been well taken, but could not be a ground of jurisdiction in this court, for so far from showing a statute of a State repugnant, &c., it wholly denies said act to be a statute of a State. If it were not a statute, it is not within the provisions of the twenty-fifth section to give this court jurisdiction. If said act be a statute of a State, then no exception was taken that it was repugnant, &c., and the indispensable prerequisites to jurisdiction again wholly fail. See *Weston v. City Counsel of Charleston*, 2 Pet., 463, 464; *Satterlee v. Matthewson*, Id., 409; *Wilson v. Blackbird Creek Co.*, Id., 245; *Craig v. State of Missouri*, 4 Id., 410; *Crowell v. Randall*, 10 Id., 368; 5 Cranch, 344. It is clear, therefore, that this is not a case where is “drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States.” And this court can entertain no jurisdiction on this ground, it not being a case contemplated by said section.

\*From the said case and the record it further appears, that, on the trial of the issue in the court below, the Detroit Young Men's Society, plaintiffs in that court, claimed title to said lot as grantees thereof from the United States, through the governor and judges of the Territory of Michigan, under an act of Congress, approved April 21st, 1806, entitled “An act to provide for the adjustment of titles of land in the town of Detroit, Territory of Michigan, and for other purposes” (2 Stat. at L., 398), and produced and proved a deed of said lot, executed by said governor and judges, bearing date July 1st, 1836. The defendants made several objections to said deed, all of which were overruled, and the title so claimed under the act of Congress was fully sustained by the State court. Do these facts furnish ground of jurisdiction to this court? I think not. To give this court jurisdiction under the first clause of section 25 of the Judiciary Act, where the validity of an authority exercised under the United States is drawn in question, the decision of the State court must be against its validity. Here the decision of the

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State court was in favor of the authority exercised under the United States, so there can be no pretence of jurisdiction on that ground. *Gordon v. Caldecleugh*, 3 Cranch, 268. It was perfectly competent for the court below to take cognizance of the title to said lot, there claimed by the plaintiffs under the United States; its decision sustained the title claimed under the United States; it is now *res adjudicata* by a competent tribunal, and this court has no power to revise or disturb the decision of the State tribunal upon that point.

Upon the plaintiff's case as presented in the court below, and the questions raised thereon, nothing appears upon the record to give this court jurisdiction.

*Mr. Howard*, for the defendants in error, said that his first duty was to disentangle the case from the matters which did not properly belong to it. The entire record has been brought here, just as it was exhibited to the Supreme Court of the State of Michigan, and although all the points raised in it were very proper for the consideration of that tribunal, yet they must nearly all be laid aside under this writ of error. 10 Pet., 268.

The plaintiffs below offered only two pieces of evidence, and then rested their case. These two were,—1. An act of incorporation; 2. A deed from the judges of the United States for the lot in question.

1. The act of incorporation is the hinge upon which the whole controversy turns. It will be considered as properly before this court for examination, and the objections to its admission as evidence will be reserved for discussion hereafter. At present, I am getting rid of superfluous matter.

2. The deed from the judges was also objected to in the \*369] State \*court. But that objection can find no place here. The Judiciary Act is very explicit in conferring upon this court an appellate power only where a State court decides against the validity of an authority exercised under the United States. But the authority claimed here was, that the judges of the United States had the legal right to execute this deed, and the decision was in favor of its validity. Jurisdiction over this question is therefore excluded by the terms of the act. It is very clear that the framers of the act of 1789 thought that, as long as the State courts decided in favor of any power claimed to be exercised under the United States, or against a power claimed under a State law, there was no necessity of a revising power in this court; because the feelings of State pride and State interest would not probably allow of such decisions unless they were correct. At

all events, there was no danger of an encroachment upon the powers of the federal government by the States as long as the State tribunals themselves prevented it by their decisions. All this is so clear, that it is deemed unnecessary to consume any more time upon the question of the admission of this deed. If the decision below was erroneous, this court has no power to review it.

Many questions arose in the court below upon the evidence offered by the defendants, but, with the exception of the point reviewed above, none of them can be considered as properly before this court.

1. The defendants below offered a deed from the treasurer of Wayne county to them, which deed the court refused until it was first shown that the lot was assessable for taxes and that the title had passed out of the United States. It is not perceived under what head of jurisdiction the reviewing power over this decision can be placed. The authority to tax and sell did not begin until the title passed out of the United States. Consequently the decision is in favor of the exemption from taxation, and not within the twenty-fifth section.

2. The defendants below then offered in evidence a resolution of the governor and judges, that the basis of the town should be an equilateral triangle, &c., &c., and then proved, by a mathematical calculation, that lot No. 56 was the same as lot No. 52. It is evident that the point ruled by the court was, not the invalidity of the deed from the judges, but the insufficiency of the evidence to prove the identity of the two lots. The deed conveyed lot No. 52. But the lot in dispute was lot No. 56, and the first step for the defendants below to take was to establish the identity of the two lots. But the court decided, as a question of general evidence, that these mathematical calculations were not sufficient to prove it. As a question of general evidence, it can, by no possibility, be before this court.

3. The defendants further offered certain parol evidence, which the court rejected. With this, we have nothing to do.

\*The instructions given by the court below were [\*370 four, viz.:—

1. That the lessors of the plaintiff were well incorporated.
2. That the deed of the judges was well executed.
3. That on the 1st of July, 1836, there were a governor and judges competent to convey title.
4. That the governor need not have signed the deed.

The first point is the one reserved, to which the attention of the court will be called presently. Upon the other three, the

decision is in favor of the validity of the commission under the United States, and affords no ground for the jurisdiction of this court.

So with the instructions asked for and refused. Those which are cognizable by this court are only a repetition, in different phraseology, of the same question, viz. whether or not there was in Michigan, at the time of passing the act of incorporation, a legislature capable of enacting valid laws.

With respect to the question of jurisdiction, it is not necessary to say much, because my colleague has placed that point in an attitude of great strength. But the opposite counsel is endeavoring to maintain two contradictory propositions, which cannot both be correct, viz.:—That Michigan was not a State, because the territorial judges were found to be there in the exercise of territorial authority; and, 2d. That the judges had no right to execute the deed, because the establishment of a State government had annulled their authority. Both of these positions could not be sound. The counsel must choose one of them, and maintain only that one. If, with a view to destroy the deed, he set up a State government, be it so. He could then no longer call into question the legality of the charter. But if, with a view to destroy the State government, he set up a territorial authority, be it so. He must then admit the validity of the deed. It was remarkable, too, that the learned counsel was compelled, in order to maintain his argument, to sweep away the very ground upon which he stood in this court. He came here to complain of the statute of a State, in the language of the twenty-fifth section of the Judiciary Act, and his first blow was against the existence of the State herself. But if Michigan was not a State when the act was passed of which he complains, then he destroyed his own standing here, because it was only the statute of a State which was cognizable. And thus, the more effectively the learned counsel sustained his position, by just so much did he make it more apparent that this court had no jurisdiction over the case.

Passing on to another branch of the case, *Mr. Howard* said he would endeavor to maintain the three following points, viz.:—

1. That the power to admit new States is a political power to be exercised by Congress alone, and that all questions touching its exercise are political questions, not confided to the judicial power by the constitution and laws.

2. That the admission of Michigan into the Union was a  
\*371] \*complete exercise of the political power vested in Congress. It ratified the previous proceedings of the

people of Michigan, and thereby excludes all inquiry into their correctness by the judicial power.

3. If the objection to the jurisdiction fails, then,—That the people of Michigan had a right to proceed to establish a government whenever the contingency happened, as provided for in the ordinance of 1787.

*1st Point.* The existence of two classes of questions, viz. judicial and political, has been more than once recognized by this court, over one of which jurisdiction reaches, but over the other it does not. The line which divides these two classes has never been traced, but the court has wisely contented itself with deciding, in each case, whether it lay on one side of the line or the other. When these decisions shall have become more numerous, it will be time enough to run the line throughout its whole extent, and frame a theory. For example, this court has considered the question of a disputed boundary, such as that of the Rio Perdido, as a political question, into the merits of which it would not look. Perhaps it might be laid down as one of the governing principles on this subject, that when a question, from its nature, belongs to the consideration of either the executive or legislative branches of the government, the judicial power will abstain from exercising any jurisdiction over it. See, on this subject, 12 Pet., 517, 657, 731, 736-738; 5 Id., 20.

No stronger illustration can be given of the nature of the question now before us than to refer to an actual occurrence in our history. The question is, whether Michigan was a State in March, 1836. In the fall of 1836, she cast her vote, as a State, for President and Vice-President of the United States. When the votes were counted, in February, 1837, in the presence of the Senate and House of Representatives, the late attorney-general, Mr. Grundy, then a member of the Senate, was chairman of the joint committee, and announced the result of the count in this manner:—"If the vote of Michigan be counted, Mr. Van Buren has" (naming the number). "If the vote of Michigan be not counted, he has" (naming that number). "But in either event he has received a constitutional majority, and is therefore elected President of the United States."

Now, the question which was thus left unsettled, and which would have distracted the country if it had been necessary to settle, is the precise question which the learned counsel now calls upon this court to decide. Time has not varied it. Suppose that the vote of Michigan had been necessary to make a majority, and this court had then been appealed to to decide whether Michigan had a right to vote or not. Would

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not the answer have been, "Non nostrum tantas componere lites"? It is not necessary to pursue this train of reflections any further.

\*372] \*The government which existed in Michigan during the year 1836 was recognized by the executive of the United States as existing *de facto*, if not *de jure*. It was not denounced and treated as an insurrectionary, disorganizing body. No proclamation was issued, calling upon the insurgents to disperse; no militia of the neighbouring States were called out to suppress the insurrection. But, on the contrary, Congress and the President remained tranquil spectators of what was doing. If this court follows the lead of the executive in recognizing foreign governments *de facto*, why not in this case also?

*2d Point.* It is necessary to recur to dates:—

1835, May 11. Convention met to frame a constitution.

1835, November 3. Legislature met and organized.

1836, March 26. Act of incorporation.

1836, April 1. Society went into operation.

1836, June 15. Act of Congress (5 Stat. at L., 49):—

"An act to establish the northern boundary-line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed."

1836, June 23. Supplementary act (5 Stat. at L., 59).

1836, June 30. Session of United States court and judges.

1836, July 1. Sibley, Morell, and Wilkins acted as judges.

1836, July 1. Deed from the judges.

1837, January 26. Michigan finally admitted (5 Stat. at L., 144).

In these acts of Congress, and especially that of June 23, 1836, the proceedings of the people of Michigan are spoken of as valid. The constitution is mentioned as one "which the people have formed," and propositions are submitted to the "legislature of the State of Michigan," &c., &c.

These ratifications by Congress, acting under its express power to admit new States, preclude this court from a reëxamination of the subject. The power in Congress is a political one, and has been fully exercised under its own responsibility. Will this court ever consent to hear an argument whether Texas was constitutionally admitted or not?

*3d Point.* The people of Michigan had a right to do what they did under the ordinance of 1787. This ordinance is reprinted in 1 Stat. at L., 51, note. The fifth article says, when there are sixty thousand persons, it shall be admitted by its delegates into the Congress of the United States; and

shall be at liberty to form a permanent constitution and State government.

The act of Congress of August 7, 1789 (1 Stat. at L., 50), makes this ordinance "continue to have full effect."

The only difference between the learned counsel and us is, that he thinks there must be a preliminary act of Congress, authorizing a census under federal authority, and the sitting of a \*convention; whilst we contend that it is competent for the people to number themselves, and to [373 assemble in convention, if the number shall be found sufficient.

These rights under the ordinance are political vested rights, which no authority can take away or lessen. But if, by an interpolation into the constitution, a previous act is held to be necessary by Congress, these rights no longer depend upon the happening of the contingency provided for, but upon the pleasure of Congress.

Very many circumstances might arise to prevent Congress from passing a preliminary law. Want of time, pressure of other business, party intrigue, a difference of opinion between the Houses, and all the ills that legislation is heir to, might occur to prevent such an act. These dangers were not contemplated by the ordinance. The grant of power was full, direct, unequivocal, and positive; as much so as the right of suffrage in an individual when he attains the necessary age. When the fact happens, the right accrues and becomes active.

There is nothing in the nature of the power in Congress which demands the preliminary act, for the people can just as well number themselves, and assemble spontaneously in convention. For the rule, see 16 Pet., 622.

Again; this course of proceeding is sanctioned by long established practice since the foundation of the government.

1791, Feb. 4. Kentucky was admitted without a previous law for a convention. 1 Stat. at L., 189.

1791, Feb. 18. Vermont was admitted in the same way. 1 Stat. at L., 191.

In this case, Vermont had been passing laws, by her own independent authority, ever since March, 1789. Any one of these laws might have been questioned on the same ground on which this act of incorporation is now disputed. What would have been the reply of this court? It is furnished in 12 Pet., 724, where the court say, speaking of Vermont,—  
'The people assumed by their own power the position of a State, and settled the controversy by taking to themselves

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the disputed territory as the rightful sovereigns thereof." 12 Pet., 724.

1796, June 1st. Tennessee admitted. 1 Stat. at L., 491.

But these had no Act of Congress to authorize a convention, and this point was distinctly brought before both Houses of Congress. The whole of the discussion is an interesting chapter of American history. The committee of the Senate reported against the admission, on the very ground now taken by the opposite counsel, whilst the committee of the House of Representatives assumed the doctrine for which we are contending.

The result was, that the Senate yielded, and the precise question now at issue was settled by Congress, as far as the legislative branch of the government could settle it, fifty years ago.

\*The legislature of Tennessee met on the 28th of \*374] March, 1796, and sat until the last of April, in which time the whole State government was organized. The case is exactly parallel with that of Michigan.

For the proceedings, see Senate Journal for 1796, from April 11th, p. 236, to June 1st, and also December 6, 1836; American State Papers, Gales & Seaton, tit. *Miscellaneous*, vol. 1, p. 147.

Mr. Justice WOODBURY delivered the opinion of the court.

I am instructed by the court to say its opinion in this case is, that it possesses to jurisdiction over the questions submitted. No other point is decided by us, though others of much interest are involved in the merits respecting the due organization of States, under our political system, and the effect which their admission into the Union by Congress has on the validity of their previous proceedings.

Some contend, that when these matters properly arise in a cause, they are mere political questions,—to be settled by the action of the other departments of the government, and not to be reëxamined here.<sup>1</sup> *Barclay v. Russel*, 3 Ves., 429; *The Nabob of Arcot's case*, 2 Bro. Ch., 6; *Foster et al. v. Neilson*, 2 Pet., 309; *The Cherokee Nation v. Georgia*, 5 Id., 20; *Rhode Island v. Massachusetts*, 12 Id., 730, 736, 738; *Garcia v. Lee*, Id., 517, 518.

And it is argued that the acknowledgment of a domestic State is like the recognition of the independence or existence of a foreign State; and the latter is well known to preclude

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<sup>1</sup> RELIED ON. *Luther v. Borden*, 7 How., 57.



any further inquiry by the judicial tribunals into the fact of their due organization. See, on this, 5 Pet., 50, 59; 2 Cranch, 241; 3 Wheat., 634; 4 Id., 64.

It is further contended, that if a State be recognized or admitted into the Union under a particular form of government or constitution, this, of necessity, implies that such organic arrangement is to be treated as valid from its creation, and the previous legislation under it is to be considered as done or performed by a competent authority.

But we do not find it a duty to decide any of these delicate and important questions, considering the situation of the record in this action and the preliminary points which arise on it, and which must first be disposed of.

This being a writ of error to a State court, sued out with a view to reverse its decision in a case of ejectment between these parties, the only authority and the only ground for our interference with the decisions of the State tribunals is, in substance, that they have overruled some right or defence set up under an act of Congress, or treaty, or constitution of the United States. 14 Pet., 46, 353; 12 Id., 66; *Williams v. Norris*, 12 Wheat., 124.

The principle under which the Judiciary Act of 1789 allows this interference of ours in the relations between the two governments, \*always of so sensitive and responsible a character, is, that no government can be efficient or [\*375 just without the means of self-protection; and hence, that those who act under it or claim rights beneath the shield of its laws should, within its own territory, be able to appeal to its own tribunals for relief whenever their claims under it are decided against in the courts of the States. But prejudices here are to be guarded against as well as there; and hence the paramount rule of construction, in all cases of this kind, ought to be, not to interfere at all unless the decision is shown to come clearly within the letter and spirit of the act of Congress permitting an appeal; and, when interfering, not to overrule the judgment of the State court unless clearly erroneous.

Firstly, then, is there a proper case presented here for our interference at all? Three instances are enumerated in the Judiciary Act, in which a writ of error lies to a State court, e. g. (1.) "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; (2.) or where is drawn in question the validity of a statute of, or authority exercised under, any State on the ground of their being repugnant to the constitution, treaties, or laws of the

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United States, and the decision is in favor of such their validity ; (3.) or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of said constitution, treaty, statute, or commission." 1 Stat. at L., 85, § 25.

A claim is made to sustain this writ and our jurisdiction under the first specification, because an authority was set up by the original plaintiffs, that the deed to the Young Men's Society was good under the acts of Congress, and this was excepted to by the defendant. But that cannot be made the subject of a writ of error, because the State court decided in favor of its validity. *Gordon v. Caldcleugh et al.*, 3 Cranch, 268; *Walker v. Taylor et al.*, 5 How., 64.

Another decision, which was made by the State court against the right set up by the original defendant under acts of Congress in respect to his title, is attempted to be made a subject for reëxamination under this writ. But it cannot be, for two reasons. One is, it does not appear what acts of Congress are referred to; and the other is the probability, on the face of the record, not that such acts were decided against, but only that the evidence adduced in relation to the right set up under them was overruled. Consequently, nothing remains under which to claim jurisdiction, except the second specification in the Judiciary Act. It is contended that the objection, which was made in this case to the validity of a statute of the State, on the ground that the legislature were not competent or duly organized, under acts of Congress and the constitution, \*so as to pass valid statutes, and which was over-  
 \*376] ruled, comes within that specification.

The first difficulty interposed against this point is, that the plaintiffs in error do not in the record specify what parts of the constitution or act of Congress they consider to have been overruled by the State court, nor in terms that any parts of either were so overruled. The course pursued here is a looser mode of stating exceptions than is customary, and could hardly be sustained if it did not appear on the record that the competency of the legislature of the State of Michigan to pass certain laws was in fact called directly in question, and the validity of them contested, on the ground that, when the laws passed, the territorial government over Michigan was still in force, and the new State government had not been duly organized. And it seems to have been admitted on both sides that this objection was urged,—and it is difficult to conjecture

any other ground for such an objection to the competency and power of the new State government, unless founded on its non-conformity to the existing acts of Congress as to the Territory, and the clause in the constitution for the admission of new States. The argument was a fair one, that, as the territorial government was still in operation in Michigan for some purposes, no new political organization could take place within its limits which was capable of passing valid laws or charters of incorporation, without a previous sanction by Congress, under the third article of the constitution.

There probably is enough in this record to show that such questions were raised, and that the State court decided against the validity of the objection, and under this view and the authorities of the following cases we shall then treat this exception as sufficiently set out in the record. *Coons et al. v. Gallagher*, 15 Pet., 18; *Williams v. Norris*, 12 Wheat., 117; *McBride v. Hoey*, 11 Pet., 167; *Crowell v. Randell*, 10 Id., 368; *M'Kinney v. Carroll*, 12 Id., 70; 5 Id., 248.

But the exception, if well stated, applies to nothing except the validity of the particular statute that incorporated the Young Men's Society, under which Jones, the original plaintiff, claims. Nor does it question the validity of that statute on account either of its terms or subject-matter, but the inability or incompetency of its makers as a political body to pass any statute whatever. Now to ascertain whether such an objection can come within the true meaning of the Judiciary Act, it will be necessary to look at the language as well as obvious design of the latter in conferring this searching and overshadowing power of revision over the State tribunals. As before suggested, it was to prevent partiality in them against the authority and agents of the general government; to hold the protecting supervision in respect to its own constitution, treaties, and acts of Congress, for purposes of self-preservation and self-defence, and finally to insure uniformity in the construction and operation of them over the whole Union.

\*Hence, two things must unite, in order to justify [377 it. There must be an act of solemnity and importance, such as a statute, and that statute must be by a State, a member of the Union and a public body, owing obedience and conformity to its constitution and laws. This seems to have been settled by this court as to the meaning of the word "State," where empowering one to bring an action. It must be a member of the Union. *Cherokee Nation v. Georgia*, 5 Pet., 18. And it is not enough for it to be an organized political body within the limits of the Union.

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In conformity with this, where it is required that a party should be a citizen of a different "State" in order to give a Circuit Court jurisdiction, it has been held it is not sufficient to be a citizen of the District of Columbia (*Hartshorn v. Wright et al.*, Pet. C. C., 64; *Hepburn et al. v. Ellzey*, 2 Cranch, 445), or citizen of a Territory (*New Orleans v. Winter*, 1 Wheat., 90), but the party must belong to a State in the Union, one of the members of the confederacy. Chief Justice Marshall, in *Hepburn et al. v. Ellzey*.

Indeed, it has been settled also, that a law passed by Virginia, before the government of the Union took effect, cannot be examined and decided upon under this clause of the Judiciary Act. *Owings v. Speed et al.*, 5 Wheat., 420.

The words of this clause also appear to be such, as to admit of no other construction than that the statute is a measure by a body confessedly a State. They are,—“where is drawn in question the validity of a statute of, or authority exercised under, any State,” &c.

Besides this apparent recognition, that nothing is to be examined which does not apply to what is contained in a statute, and that passed by a State, the evil to be remedied and guarded against was connected merely with the subject-matter of statutes, and not with the political competency of their makers.

The fears were, from the reasons just enumerated, that through some inadvertence, if not design, a State might legislate against some part of the constitution, or a treaty, or an act of Congress, and might trench upon matters not within its province nor belonging to its internal concerns, but belonging to Congress, and which, by express terms or necessary implication, were forbidden to be acted on by the State governments.

Such being the evil or danger, it precludes the idea that this clause in the Judiciary Act had any reference to the fact, that public bodies which had not been duly organized, and not been admitted into the Union, would, as States, undertake to pass laws, without being empowered to do it, which might encroach on the Union or its granted powers, and hence should be thus guarded against. Such conduct by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of  
 \*378] any of the departments of this government, unless so  
 \*interfering with its rights as to call for the political exercise of the executive and legislative authority over our foreign relations.

Again, such conduct by bodies situated within our limits,  
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unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies unlawfully organized are situated and acting. While in that condition, their measures are not examinable at all by a writ of error to this court, as not being statutes by a State, or a member of the Union. And after such bodies are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunals of the general government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State, within the meaning and spirit of the Judiciary Act. And, if so, we must inquire only into the validity of their subject-matter, and not as to the new, any more than the old, States, ever suppose that the question of their political competency or power to pass statutes at all was an inquiry intended to be placed under our consideration and decision by the twenty-fifth section of the Judiciary Act.

It follows, then, that a statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of § 25 of the Judiciary Act, unless reenacted or adopted after becoming a State (3 How., 482); then it is treated like the statute of any State; or the admission of the State into the Union by Congress, subsequently with the constitution and political organization under which the statute was passed, must bring it under our consideration as a statute passed by the State,—a competent State,—leaving, as in other cases, merely its subject-matter to be examined in order to see if it violates or not any acts or provisions of the general government.

The question of their competency is not, however, thus made a closed one, but may be discussed before the proper political tribunals. And where, under particular laws, their competency is not conceded, it may come under the consideration and decision of the State courts, and probably of those of the United States. All we decide in this instance is, that it is not one of the grounds for our reëxamination of decisions on it, under the Judiciary Act. And it is no more objectionable to shut out such a question from revision in that way, than numerous others which are not included either in the words or objects of that act. Indeed, there were, and still are, some of the highest motives of expediency and sound

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public policy not to entangle this court with the reconsideration in this way of a matter so purely political and often so full of party agitation. It is pretty \*strong evidence \*379] that this view of the Judiciary Act, and our duties under it, must be the correct one, when, on full examination of the precedents, no case can be found where an objection of this character to a statute of a State has ever been sustained, or deemed even a proper ground for exception below, and afterwards brought under the revision of this court by a writ of error. The case of *Owings v. Speed et al.*, 5 Wheat., 421, before cited, comes nearest to this. Taking it for granted, then, we have shown that the revision in a case like this must be of a "statute" and a statute of a "State," and not of a Territory, or corporation, college, or unacknowledged political body, and considering these as concessions, or admitted data, before the jurisdiction arises to issue a writ of error, and look into the subject-matter of such statute in order to ascertain whether in its terms or operation it runs counter to the powers of the general government, and that it is acknowledged on both sides there is nothing exceptionable in the subject-matter of this statute, it follows that there is nothing to revise or correct, which is within the purview of the judicial functions of the general government under the Judiciary Act.

Let the writ of error be dismissed for want of jurisdiction.

Mr. Justice McLEAN.

I think there is jurisdiction in this case. The Detroit Young Men's Society, in their corporate capacity, brought an action of ejectment against Scott and Boland to recover possession of the lot in question.

The deed under which the lessors of the plaintiff claimed was dated the 1st July, 1836, and was signed by three judges of the Territory of Michigan. In making the conveyance, the judges acted under a law of Congress of the 21st April, 1806. As regards this question, it is not important to examine the execution of this trust.

On the trial it was proved "that a legislature of the State of Michigan, duly elected and returned, was organized and duly qualified under the constitution of the State of Michigan on the 3d November, 1835; and that Stevens T. Mason, having been duly elected and returned, was on the same day qualified as governor, &c. That the act entitled 'An act to incorporate the members of the Detroit Young Men's Society' was approved 24th March, 1836."

It was proved, by reputation, that John S. Horner pur-

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ported to act as territorial governor of Michigan until some time in the year 1836, and that George Morell and Ross Wilkins acted as judges until June of that year. That a session of the territorial court was held on the first Monday of January, 1837.

The State of Michigan was admitted into the Union by the act of the 26th January, 1837.

On the trial, the counsel moved the court to instruct the jury, that the act "to incorporate the members of the Detroit Young \*Men's Society" was not of binding force, [\*380 "unless the jury should find that the State govern- ment of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation."

The twenty-fifth section of the Judiciary Act of 1789 provides, "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity," may be reexamined in this court by a writ of error.

This act of incorporation was given in evidence, as a part of the plaintiff's title; and on the validity of the act his right to a recovery depended. The deed having been made to the lessors of the plaintiff as corporators, they could recover only in that capacity. The validity of this statute was questioned, as appears from the record, on the ground that it was passed before the State was admitted into the Union; and the court held that the statute was valid. By the constitution, Congress has power to admit into the Union "new States." The time of admission is a question of law, and not a political question. At the present term we have had occasion to decide the date of the admission into the Union of the States of Florida and Iowa.

The above facts present the very case provided by the statute for the exercise of jurisdiction by this court. A right was set up under the statute of a State, and that statute was alleged to be repugnant to the constitution and laws of the United States; and the decision of the State court was in favor of the validity of such statute. No case, it would seem, could arise, more completely within the letter and spirit of the twenty-fifth section.

It is said that the act upon its face does not purport to be repugnant to the constitution or laws of the United States.

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If this be admitted, it by no means follows that the act is constitutional. Whether constitutional or not must be determined by the effect of the act. But in my judgment this act is repugnant to the constitution and laws of the Union.

Michigan was an organized Territory of the United States. Its governor, judges, and all other territorial officers, were in the discharge of their various functions. The sovereignty of the Union extended to it. Under these circumstances, the people of Michigan assembled by delegates in convention, and adopted a constitution, and under it elected members of both branches of their legislature, governor, and judges, and organized the State government. No serious objection need be made, in my judgment, to the assemblage of the people in convention to form a constitution, although it is the more regular and customary mode to proceed under the sanction \*381] of \*an act of Congress. But until the State shall be admitted into the Union by act of Congress, the territorial government remains unimpaired.

No act of the people of a Territory, without the sanction of Congress, can change the territorial into a State government. The constitution requires the assent of Congress for the admission of a State into the Union; and "the United States guaranty to every State in the Union a republican form of government." Hence the necessity, in admitting a State, for Congress to examine its constitution.

The act "to incorporate the members of the Detroit Young Men's Society," was the exercise of sovereign power,—a power totally repugnant to the sovereignty of the Union, in its territorial form. Until the 26th of January, 1837, Michigan was not admitted into the Union and recognized as a State. Whatever effect this admission may have, by way of relation, on the exercise of the political powers of the State prior to that time, is not now a question. The question of jurisdiction relates to the time the act was passed, and its validity.

This act of incorporation was repugnant to the constitution of the United States, under which the territorial government was organized. It was repugnant to the laws of Congress which formed that organization. It was an exercise of sovereignty incompatible with the sovereignty of the Union, in all its legal forms. And this act was declared by the Supreme Court of Michigan to be valid. I cannot conceive of a clearer case for jurisdiction.

In *Holmes v. Jennison*, 14 Pet., 540, the governor, in the exercise of a supposed power in the State, directed a fugitive from justice, claimed by the Canadian government, to be



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delivered up; and the Supreme Court of that State, having brought the accused before it by a *habeas corpus*, remanded him to custody. This court, under the twenty-fifth section, took jurisdiction of the case, on the ground, in the language of the chief justice, "that the exercise of the power in question by the States is totally contradictory and repugnant to the power granted to the United States." And again he says,— "All the powers which relate to our foreign intercourse are confided to the general government." "If there was no prohibition to the States, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."

Now, in the case of Holmes, there was no power to surrender the fugitive in the federal government, as such power was not conferred by the laws of nations, but must be given by a treaty, or by reciprocal legislation. Still, as the foreign intercourse was vested in the general government, no part of it could be exercised by the States without conflicting with the federal power. Now the conflict of power, in the case under consideration, is clear and direct. \*The two [\*382 sovereignties of the State and the territorial government cannot exist at the same time within the same limits. The territorial government exists in full vigor until it is abolished by the admission of the State. There was, then, a direct and irreconcilable repugnance in the exercise of the sovereign power by the State, so long as the federal authority was exercised in the Territory.

Mr. Justice WAYNE concurred, that this court had not jurisdiction in this case, but did not assent to any conclusions in the opinion on the merits in this controversy involving the political relations of Michigan with the United States before Michigan was admitted into the Union.

Mr. Justice NELSON concurred with the opinion of Mr. Justice McLean.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Michigan, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

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The United States v. The Bank of the United States.

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**THE UNITED STATES, PLAINTIFFS IN ERROR, v. THE BANK OF THE UNITED STATES.**

In the case of *The United States v. The Bank of the United States* (2 How., 711), the court is of opinion that the question on the structure of the bill is an open question, and for the first time presented to this court for decision.

The statute of Maryland of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government.

A bill of exchange in form, drawn by one government on another, as this was, is not and cannot be governed by the law merchant, and therefore is not subject to protest and consequential damages.<sup>1</sup>

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was a continuation of the same case, between the same parties, which was reported in 2 How., 711.

Being sent back to the Circuit Court, it came up for trial in November, 1844, when the jury, under the instructions of the court, found a verdict for the defendants below, viz. the bank.

At the trial, the following bill of exceptions was filed, which brought the case again to this court.

**Bill of Exceptions.**

Be it remembered, that at the sessions of April, A. D., 1838, came the United States of America into the Circuit Court of \*383] the United States for the Eastern District of Pennsylvania, and impleaded the President, Directors, and Company of the Bank of the United States, in a certain plea of trespass in the case, &c., in which the said plaintiffs declared (*prout* narr.) and the said defendants pleaded (*prout* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city of Philadelphia, before the Honorable Archibald Randall, judge of the said court, on the day of November, A. D., 1844, the aforesaid issue between the said parties came to be tried by a jury of the said district, duly impanelled (*prout* jury), at which day came as well the plaintiff as the said defendant, by their respective attorneys; and the jurors aforesaid, impanelled to try the issues aforesaid, being also called, came, and were then and there in due manner chosen and sworn, or affirmed, to try the said issues; and, upon the trial, the counsel of the said plaintiffs stated their demand to

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<sup>1</sup> See *United States v. Bank of Metropolis*, 15 Pet., 377; 7 Opinion of Attorney-General, 599; 4 Id., 90.

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be for \$170,041.18, with interest,—the balance unpaid,—due to the plaintiffs as holders of 66,692 shares of the capital stock of defendants, of \$3.50 per share, being the amount of a dividend of half-yearly profits declared by the defendants in the month of July, A. D., 1834. And to maintain the said issue on the part of the plaintiffs, proved that they were then the holders of said shares of stock, and gave in evidence a resolution of the directors of the said defendants made on the 7th July, 1834 (*prout*), and their advertisement in one of the daily newspapers of Philadelphia (*prout*), and the account of the said defendants in their books with the plaintiffs for the first half-year of 1833 (*prout*).

And the defendants, to maintain the said issue on their part, gave in evidence a bill of exchange, drawn and dated at the treasury department of the United States, Washington, 7th February, 1833, by the Secretary of the Treasury on the Minister and Secretary of State for the Department of Finance of the kingdom of France for 4,856,666<sup>88</sup>/<sub>100</sub> francs, payable at sight to the order of defendants' cashier (*prout bill*); and the several indorsements thereon, (*prout*); and a writing of the same date with the said bill, under the seal of the United States and hand of the President, dated at Washington (*prout*); and the presentment and refusal of payment and protest of said bill, at Paris, on the 22d of March, 1833 (*prout*); protest, and a notice thereof by defendants, through their cashier, to the said Secretary of the Treasury, in a letter of 26th April, 1833 (*prout*); and the return of said bill and protest to the said Secretary of the Treasury, in a letter from the said defendants' cashier, dated 13th May, 1833, with an account annexed; in which letter and account demand was made of the payment of the principal of the said bill, with costs and charges of protest and interest thereon, and damages on said principal, at fifteen per cent. (*prout letter and account*); and proved the then rate of exchange to have been as \*therein stated; and gave in evidence a statute of the State of Maryland (*prout*), passed in 1785, [\*384 and an article of the commercial code of France (*prout*); and the correspondence (*prout*) between the Secretary of the Treasury and the defendants, concerning said bill, before and after the drawing thereof, and proved the allowance by the Secretary of the Treasury of a credit for, and payment thus made, of the principal of said bill; and further proved the presentment to the accounting officers of the treasury, and their rejection and disallowance of a claim on the part of the defendants, for a credit of the said fifteen per cent. thereon, and said cost and charges of protest (*prout exemplification*);

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and the said defendants claimed on the said trial a credit for and to set off defalc.: the same claims being, as they alleged, in amount equal to the claim of the plaintiffs.

And the said plaintiffs, to rebut the aforesaid claim of the said defendants to a set-off, relied upon and gave in evidence a convention between the United States of America and France, made the 4th day of July, A. D., 1831, and ratified the 2d day of February, A. D., 1832 (*prout* same), together with an act of Congress passed the 18th day of July, 1832 (*prout*), by the seventh section of which it was made the duty of the Secretary of the Treasury "to cause the several instalments, with the interest payable thereon, payable to the United States, in virtue of the said convention, to be received from the French government and transferred to the United States in such a manner as he may deem best, and the net proceeds thereof to be paid into the treasury." And also a letter of Edward Livingston, Department of State, dated Washington, 8th February, 1833, to Nathaniel Niles, Esq., Paris. (*prout* same.)

And the counsel for the said plaintiffs requested the learned judge to charge the jury,—

1. That the evidence in the cause does not show a contract between the government and the bank for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the plaintiff, to transfer to the United States the first instalment due under the treaty with France, and that the bill was only one of the instruments for carrying the same into effect. And further, that the question of agency is for the jury to decide.

2. That the act of Maryland of 1785, under which the defendants claim damages, does not extend to the United States.

3. That the bill in question, being drawn by one government upon another, and upon a particular fund, is not a bill of exchange within the legal meaning of the terms, and is not embraced by the statute.

4. That the defendants, being indorsers of the bill, and not the holders or owners at the time of protest, are not entitled to the damages, since they have not paid them.

But the court refused to instruct the jury as requested by the plaintiffs' counsel, and charged them as follows, to wit:—

It is admitted, that if this was a suit between individuals, \*385] and the \*defendant was the actual owner of a bill of exchange drawn by the plaintiff on a foreign country, and protested for non-payment, he would be entitled to the damages now claimed by the bank; but it is contended, 1st. that the evidence in this cause does not show a sale of the

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bill of exchange to the bank, but an agency on the part of the bank to assist in procuring the transfer of the funds to the United States. The whole of the evidence on this subject is in writing, and therefore a matter of law, and, in my opinion, establishes a clear and unequivocal sale by the United States, and purchase and payment for the bill by the bank; and that in the endeavours to collect it there was no other agency than always exists between the owner and other parties to a bill of exchange. Again, it is said, that if this was a purchase of the bill by the bank, yet the defendants cannot set off this claim, because the act of Maryland of 1785 does not extend to bills drawn by the government of the United States. When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility, of individuals who are parties to such instruments; there is no difference, except that the United States cannot be sued; and from the unavoidable use of commercial paper by the United States, they are as much interested as the community at large in maintaining this principle.

In the present case, the United States do not sue for a debt due to them as a government, but as stockholders or copartners for their proportion of the profits accruing on the use of their money, which they have invested in the stock of the corporation, and are to be treated in all respects like any ordinary stockholder, who would be bound to pay a debt due to the bank before he could sustain an action for his dividends.

The remaining objections are, that if the Maryland act of 1785 does embrace bills drawn by government, then this, being a bill drawn on a particular fund, is not a bill of exchange in the legal meaning of the term; and that if it is such a bill, the bank was not the holder or owner of it at the time of protest, and therefore is not entitled to the damages given by the statute.

These questions appear to me to have been determined by the Supreme Court of the United States in the present cause in favor of the defendants; whether they were rightly determined, it is not for us to inquire; that determination is binding on us, and until reviewed by themselves must be considered the law of the land. If I have mistaken their views on this, or erred in any other point of the cause, it will be corrected by a reëxamination of the case in that court; but a construction of their opinion, given by the jury, is only capable of being reëxamined in this court, which may lead to a new trial and lengthened litigation, to the disadvantage of all parties,

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as it will undoubtedly be only finally determined in the court \*386] of the \*last resort. This being, then, my view of the law, in my opinion the defendants are entitled to the verdict.

And thereupon the counsel for the plaintiffs excepted.

The cause was argued by *Mr. Clifford* (the Attorney-General) and *Mr. Nelson*, for the United States, the plaintiffs in error, and by *Mr. Sergeant*, for the Bank.

*Mr. Clifford* assigned five causes of error, viz. :—

1st. That the bill upon which the damages in controversy are claimed by the defendants in error, under the circumstances stated in the record, is not a bill of exchange and embraced by the Maryland statute of 1785.

2d. That if a bill of exchange within the terms of that statute, the statute does not extend to the United States, so as to render them liable to the payment of the fifteen per cent. damages claimed by the defendants.

3d. That the evidence in the cause does not show a contract between the plaintiffs and the defendants for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the government, to transfer to the United States the first instalment due under the treaty with the King of the French of the 4th July, 1831, and that the bill in question was one of the instruments for accomplishing that object.

4th. That the defendants, being indorsers of the bill, and not owners or holders at the time of protest, are not entitled to damages, since they have not paid them.

5th. That there was error in the charge of the court below in having instructed the jury that the defendants were entitled to their verdict, thus withdrawing from the consideration of the jury the facts which they alone were competent to find.

After stating these points, the Attorney-General proceeded with the argument.

The demand of the plaintiffs is not the subject of dispute. The questions to be determined grow out of the set-off filed by the defendants. That claim had its origin in an unsuccessful attempt of the Secretary of the Treasury, through the medium of the Bank of the United States, to transfer to this country the first instalment payable to this government by France, under the convention of the 4th July, 1831. He proposed to discuss very briefly the several points taken in the bill of exceptions, at the last trial in the court below.

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He had no doubt he might properly do so, notwithstanding the cause was formerly before the court on a previous occasion, when a decision was pronounced upon the points then presented under the bill of exceptions at that term. See 2 How., 711. If it were not apparent then, the facts now disclosed afford convincing proof, that the record in the former cause was in many respects \*incomplete. Fortunately [\*387 for both parties, the present record is sufficiently full, and the exceptions broad enough, to open the whole merits of the dispute, and to warrant the parties in submitting the cause to a final decision.

1. He submitted first the proposition, that the evidence in the cause does not show a contract between the plaintiffs and the defendants for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the government, to transfer to the United States the first instalment due under the treaty, and that the bill in question was one of the instruments for accomplishing that object.

Whatever the forms may have been, this was a public transaction between two sovereign independent nations, for the purpose of carrying into effect a treaty stipulation. In this general view the real parties are,—1st. The United States; 2d. The government of France; 3d. The Bank of the United States, at that time the fiscal agent of the government, and authorized and commissioned to demand and receive from France a certain fund, and to transfer the same to this country. Such was the purpose. The instruments executed were such as the President of the United States, the Secretary of the Treasury, and the president of the bank deemed sufficient, and best calculated to effect this object. Leaving out of view the parties to the bill in London and Paris, and supposing it to have been presented by the cashier of the bank, in whose favor it was drawn, and protested for non-payment as in this case, but without intervention,—which is the strongest view that can be taken of the case for the bank,—still the letters of the parties, and other instruments executed at the date of the bill, would determine the character of the contract. The act of Congress of the 13th July, 1832 (4 Stat. at L., 574), made it “the duty of the Secretary of the Treasury to cause the several instalments, with the interest thereon, payable to the United States, in virtue of the said convention, to be received from the French government, and transferred to the United States in such manner as he may deem best.” Congress conferred the power to cause the fund to be received and transferred. Under this act the Secretary had no right to deal in exchange, or even

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to draw a bill except as a means to accomplish the purpose described in the act itself. The Secretary of the Treasury took this view of the law in his letter to the president of the bank of the 31st October, 1832. He commences by referring to the convention, and remarks,—“The Secretary of the Treasury being charged by the act of the 13th July last with transferring to the United States the several instalments receivable under the convention, I am desirous of effecting that object in such a manner as may be most beneficial to the interests of the claimants for whom the money is to be received, and with this view I shall be glad to receive your \*388] suggestions in regard to the transfer of the first instalment.” The bank was thus officially apprized of the convention creating the fund to be transferred, and its attention specially directed to the act of Congress devolving that duty upon the Secretary of the Treasury. It was equally well advised, that the sole purpose of the head of that department was to effect the transfer of the first instalment, in a manner most beneficial to the claimants. The president of the bank, in his reply of the 5th of November, evidently regarded the proposition as one invoking the agency of the bank. He expresses himself as very willing to offer such suggestions as occur to him, in regard to the transfer of the first instalment. “After examining the subject in all its relations, with an anxiety to make the transfer on such terms as would merely prevent a loss to the bank,” &c. Having given various suggestions, he concludes by saying, that the bank “is influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury.” On the 26th January, 1833, the treasury department notify the president of the bank of their readiness to draw on the French government for the first instalment payable under the convention. On the 30th January, the reply, marked confidential, after assigning reason for increasing the rate, adds,—“Without looking, therefore, to any profit on the operation, but merely with the expectation of incurring no loss upon it.” On the 6th of February, the Secretary of the Treasury accepts the terms. The bill was drawn on the 7th, and refers to the convention in these words:—“Being the amount of the first instalment to be paid to the United States, under the convention concluded between the United States and France, of the 4th July, 1831 (after deducting the amount of the first instalment to be reserved to France under the said convention), and the additional sum of nine hundred and forty thousand francs, being one year’s interest at four per cent. on all the instalments payable to the United States, from the



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day of the exchange of the ratifications to the 2d February, 1833."

*Memorandum indorsed on the Bill.*

Total amount of indemnity payable to the United States,	ffs.25,000,000 00
Less amount of indemnity to be reserved France,	1,500,000 00
	<hr/> 23,500,000 00
One year's interest, from 2d Feb. 1832, to 2d Feb. 1833, at 4 per cent.,	940,000 00
First instalment payable to the United States,	3,916,666 66
Amount of bill,	<hr/> 4,856,666 66

On the same day the President of the United States executed an instrument in the nature of a power of attorney to the cashier of the bank, authorizing him or his assignee to receive the amount of the \*bill, and, on receipt of the sum therein specified, to give full receipt and acquit- [\*389 tance to the government of France for the first instalment. This instrument recites the convention creating the fund,—the law of Congress providing for its transfer,—the bill of exchange as the means of effecting that object,—and, being in itself a power of attorney, establishes the agency of the bank. Then follows the official despatch of the Secretary of State of the 8th February, advising the acting *chargé des affaires* in Paris that the bill had been drawn in favor of the cashier of the bank, and that it was accompanied by a full power from the President of the United States, authorizing and empowering him to give the necessary receipt and acquittance to the French government, according to the provisions of the convention, and directing the *chargé des affaires* to apprise the French government of this arrangement.

The judge in the court below erred in refusing the first instruction prayed for on the part of the United States, and instructing as he did. The agency appears from, 1st. The act of Congress,—“cause the several instalments to be received and transferred to the United States.” 2d. The letter of the Secretary of the Treasury of the 31st October,—“I am desirous of effecting that object” (the transfer). 3d. The reply of the president of the bank, of the 5th November, in which he refers to the transfer, and speaks of a bill as the means. 4th. The subsequent letters following out the idea,—“without looking, therefore, to any profit on the operation,

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but merely with the expectation of incurring no loss." 5th. The power of attorney from the President of the United States to the cashier of the bank, to receive the money and execute a discharge. 6th. The despatch from the Secretary of State. These several instruments were legally admissible to explain and qualify the bill, and constitute a part of the original contract between the parties. *Leeds v. Lancashire*, 2 Campb., 205; *Hartley v. Wilkinson*, 4 Mau. & Sel., 25; Chit. & H., 10th American, from 9th London ed., 140; Bayl. Bills, 17; Story, Bills, § 34. A bill may be written in part on one paper and in part on another separate and detached paper, if the memorandum on each be contemporaneous, and both be designed to constitute but one entire contract. The contract may thus be qualified, restrained, or enlarged. In one case it is said the paper between the original parties was but an agreement, while in the hands of an innocent holder it might become a valid negotiable security. Bills of exchange and promissory notes, like every other contract, are to be construed in such a manner as if possible to give effect to the intention of the parties. Chit. & H., 167.

2. The second proposition submitted. That the bill upon which the damages in controversy are claimed by the defendants, under the circumstances stated in the record, is not a bill of exchange and embraced by the Maryland statute of 1785.

\*390] Supposing the bill in this case to be subject to the same rules of law as are made applicable to paper between persons dealing in exchange, still the defendants' claim cannot be sustained. The money must be payable at all events, not dependent on any contingency, either with regard to event, or with regard to the fund out of which payment is to be made, or the parties by or to whom payment is to be made. Chit. Bills, 134; 1 Steph. N. P., 777. The writers upon the law of bills of exchange usually refer to a class of cases to illustrate what is meant by a bill or note payable eventually or upon condition, each of them instancing some few of the cases which have been presented for judicial determination. The principle is well stated in *Carlos v. Fancourt*, 5 T. R., 482, by Mr. Justice Ashhurst and Lord Kenyon:—"Unless they carry their own validity on the face of them, they are not negotiable." "It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a

certainty." Courts best promote the interest of a mercantile community by adhering strictly to the rules implied in the definition of a bill of exchange, rejecting every contingency. Before proceeding to discuss the contingency appearing on the face of the bill in this case, it is proper to state the nature of the contract of the drawer of a bill. "The drawing of a bill of exchange implies, on the part of the drawer, an undertaking to the payee, and to every other person to whom the bill may be afterwards transferred, that the drawee is a person capable of making himself responsible for the due payment thereof; that he shall, upon due presentment, if applied to for the purpose, express in writing upon the face of the bill an acceptance or undertaking to pay the same when it shall become payable; that he, the acceptor, shall pay the same when it becomes payable, upon due presentment thereof for that purpose; and that if the drawee shall not accept it when so presented, or shall not so pay it when it becomes payable, and the payee or other holder shall give him, the drawer, due notice thereof, then he will pay the sum or amount stated in the bill to the payee or other holder, together with such damages as the law prescribes or allows in such cases as an indemnity." Story, Bills, § 121. These are general principles, but every general principle has its exceptions. It appears on the face of the instrument in this case, that it was drawn by the Secretary of the Treasury, on behalf of the United States, upon the Minister and Secretary of State for the Department of Finance of the government of France, to secure the fulfilment of a treaty stipulation. The answer of the officer of the French government, to whom the bill was presented for payment, as stated in the protest, shows the contingency; he answered,—“that having had the orders of the Minister and Secretary of State \*for the Department of Finance, he is instructed to say, that [\*391 diplomatic treaties which impose engagements on the French treasury, to be discharged, do not become obligatory upon it until the Chambers have sanctioned the financial dispositions which are therein embraced; therefore, the treaty concluded with the United States not being yet sanctioned by the legislature, the Minister of Finance cannot at present make any payment to avail upon the obligations contracted by the said treaty.” Suppose a bill to have been drawn by a citizen of France on the treasury of the United States. The federal constitution provides,—“No money shall be drawn from the treasury but in consequence of appropriations made by law.” A bill drawn upon the treasury is subject to the contingency of that provision, as much so as if the provision itself were

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incorporated into the bill; and would it be said, that the drawer contracted against that provision, or that the appropriation had been made when Congress had not assembled? Hence it has been decided in *Reeside v. Knox*, 2 Whar. (Pa.), 233, that every bill drawn upon government is drawn upon a fund. A public officer may doubtless draw or receive bills to facilitate the business of his department, but he would transcend his power did he attempt to pledge the responsibility of the government as a merchant or banker.

As to what is contingent, or conditional. "The payment of a bill must not rest on any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument." 3 Kent, 76. "The sum to be paid must not only be in money, and certain in amount, but it must be payable absolutely and at all events. If it be payable out of a particular fund only, or upon an event which is contingent, or if it be otherwise conditional, it is not in contemplation of law a bill of exchange, or in its essential character negotiable." Story, Bills, §§ 55, 56. Other cases illustrating what is a contingency or condition:—A note promising to pay plaintiff or order on demand a certain sum, or to surrender the body of A. B. *Smith v. Boheme*, 3 Ld. Raym., 67. A promise to pay T. M. so much money, if my brother doth not pay it within such a time. *Appleby v. Biddolph*, cited in 8 Mod., 363. I, John Conner, promise to pay to John Ferris or his order fifty pounds; signed John Conner, or else Henry Bond. *Ferris v. Bond*, cited in Bayl. Bills, 17, and in Steph. N. P., 777. We promise to pay A. B. a certain sum on the death of C. D., provided he leaves either of us sufficient to pay the said sum, or if he shall be otherwise able to pay it. *Roberts v. Peake*, 1 Burr., 323. A promise to pay within so many days after the defendant should marry. *Beardesley v. Baldwin*, 2 Str., 1151. Out of my growing subsistence. \*392] *Josselyn v. Lacier*, 10 Mod., 294. Out of the fifth \*payment when it should become due. *Haydock v. Lynch*, 2 Ld. Raym., 1563. Out of A. B.'s money, as soon as he should receive it. *Dawkes v. De Lorane*, 3 Wils., 207. Out of moneys in A. B.'s hands belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of West Buckland. *Jenny v. Herle*, 1 Str., 591. 592; 2 Ld. Raym., 1361. On the sale or produce immediately when sold of the White Hart, St. Albans, and the goods, &c. *Hill v. Halford*, 2 Bos. & P., 413. Pay A. B. one month after

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\* As to the law governing the contract, see *Bronson v. Kinzie*, 1 How., 329; *McCracken v. Hayward*, 2 Id., 612.

date two hundred pounds, on account of freight of the Veale Galley. *Banbury v. Lisset*, 2 Str., 1211. Borrowed and received of A. B. in three drafts by C. D. payable to us, which we promise to pay unto the said A. B. with interest. *Williamson v. Burnett*, 2 Campb., 417. Being the amount of the purchase-money for a quantity of fir belonging to D. H. and then lying in the parish of Fillingham. Upon the note was the following indorsement:—"This note is given on condition that, if any dispute shall arise between Lady Wray and D. H. respecting the sale of the within-mentioned fir, then the note to be void." *Hartley v. Wilkinson*, 4 Campb., 127. On demand, we promise to pay to A. B., or his order, a certain sum, for value received in stock of ale, brewing-vessels, &c., this being intended to stand against me, the undersigned C. D., as a set-off for that sum left me in my father's will above my sister's share. *Clarke v. Percival*, 2 Barn. & Ad., 660. Out of my half-pay, addressed to a navy agent. *Stevens v. Hill*, 5 Esp., 247. An order to pay one thousand dollars, or what might be due after deducting all advances and expenses. *Cushman v. Haynes*, 20 Pick. (Mass.), 132. A promise to pay a certain sum provided the ship Mary arrives at a European port of discharge free from capture and condemnation by the British. *Coolidge v. Ruggles*, 15 Mass., 387. The sum must be certain, not susceptible of contingent or indefinite additions; therefore, in the case of an instrument promising to pay A. B. the sum of sixty-five pounds, with lawful interest for the same, and all other sums which should be due to him, Lord Ellenborough held that it was not a promissory note even for the sixty-five pounds. *Smith v. Nightingale*, 2 Stark., 375. I promise to pay, with interest at five per cent. I also promise to pay the demands of the sick club at H. in part of interest, and the remaining stock and interest to be paid on demand. *Bolton v. Dugdale*, 4 Barn. & Ad., 619. Nor to indefinite and contingent deductions. Thus, where the defendant promised to pay four hundred pounds to the representatives of A. B., first deducting thereout any interest or money A. B. might owe to defendant. *Barlow v. Broadhurst*, 4 Moo., 471. An order payable, provided the terms mentioned in certain letters written by the drawer were complied with. *Kingston v. Long*, cited in Bayl. Bills, 14. At thirty days after the arrival of the ship Paragon at Calcutta, pay this \*my first of exchange to the order of A. B. *Palmer v. Pratt*, 2 Bing., 185. [\*393]

3. The third point submitted. That if a bill of exchange within the terms of the statute of 1785, that statute does not extend to the United States, so as to render them liable to

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the payment of the fifteen per cent. damages claimed by the defendants.

The words of the act of Maryland are,—“That upon all bills of exchange hereafter drawn in this State, on any person, corporation, company, or society in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation entitled to the same, shall have the right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal mentioned in such bill from the time of protest until the principal and damages are paid and satisfied.” The United States are not named in this act, and it therefore does not extend to them. The king shall not be bound by a statute, whether affirmative or negative, which does not expressly name him; yet if there be equivalent words, or if the prerogative be included by necessary implication, it would seem to admit of a different construction. 2 Dwar., 670; Com. Dig. *voce Parliament*, B., 3, 8; *Murray v. Ridley*, 3 Harr. & M. (Md.), 171; *Contee v. Chew*, 1 Harr. & J. (Md.), 417; *State v. Bank of Maryland*, 6 Gill & J. (Md.), 226; *The King v. Wright*, 1 Ad. & E., 434; 3 Co., Part V., 14 b, 26; 6 Id., Part XI., 70 b, 132; *The King v. Archbishop of Armagh*, 8 Mod., 8; 1 Str., 516. As analogies:—A statute of limitations does not run against a State, unless it is expressly named. *Lindsey v. Miller*, 6 Pet., 666; *State v. Arledge*, 2 Bail. (S. C.), 401; *Wheatherhead v. Bledsoe*, 2 Overt. (Ky.), 352; *People v. Gilbert*, 18 Johns. (N. Y.), 227; *State Treasurer v. Weeks*, 4 Vt., 215; *Stoughton v. Baker*, 4 Mass., 522–528; *Nimmo v. Commonwealth*, 4 Hen. & M. (Va.), 57; *Bayley v. Wallace*, 16 Serg. & R. (Pa.), 254; *Commonwealth v. Baldwin*, 1 Watts (Pa.), 54; *Wallace v. Mercer*, 6 Ham., 366. A statute of limitations does not effect the United States. *United States v. Hoar*, 2 Mason, 311.

4. That the defendants, being indorsers of the bill, and not owners or holders at the time of protest, are not entitled to damages, since they have not paid them.

The act of Maryland, after the words recited under the last point, reads thus:—“And if any indorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation entitled to the same, the value of the principal and the damages and interest as aforesaid, such indorser shall  
 \*394] have a right to \*receive and recover the sum paid, with legal interest upon the same, from the drawer, or any

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other person or persons, company, society, or corporation liable to such indorser on such bill of exchange." Messrs. Hottinguer, by paying the bill *supra protest* for the honor of the bank, became indorsees, and acquired all the rights and were entitled to all the remedies against the bank and prior parties which the holder had, whom they paid without any indorsement or formal transfer of the bill. These rights they might have asserted to their full extent, or they were at liberty to limit and narrow them. *Chit. & H.*, 509; *Mertens v. Winnington*, 1 Esp., 112. They became the holders as indorsees by the law merchant. *König v. Bayard*, 1 Pet., 250. An acceptor for the honor of an indorser is, after payment by him, the holder. *Bayl. Bills*, 339; and he refers to *Louviere v. Laubray*, 10 Mod., 36, as authority. See also *Story, Bills*, §§ 124, 125; *Bytes, Bills*, 83. Chancellor Kent says,—“If he takes up the bill for the honor of the indorser, he stands in the right of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties.” 3 *Kent, Com.*, 87; *Mutford v. Walcott*, 1 Ld. Raym., 574; *Cox v. Earle*, 3 Barn. & Ald., 430; *Alvord v. Baker*, 9 Wend. (N. Y.), 323; *Schimmelpennich v. Bayard*, 1 Pet., 264. As an illustration:—A person who accepts for honor is only liable if the original drawee do not pay, and to charge such acceptor there must be a presentment for payment to such original drawee. *Hoare v. Cazenove*, 16 East, 391; *Williams v. Germaine*, 7 Barn. & C., 468; *Bayl. Bills*, 159. See also *Ex parte Wackerbarth*, 5 Ves., 574; *Ex parte Lambert*, 13 Id., 179; *Vandewall v. Tyrrell*, 1 Moo. & M., 87. Messrs. Hottinguer were therefore in no sense agents of the bank, but became *ex vi termini* the holders of the bill. If they were the holders in the legal sense, then the bank at the time held only the character of indorsers; they were the sureties of the drawer. *Story, Bills*, §§ 108, 120. The bank did not pay the fifteen per cent. damages to Messrs. Hottinguer, therefore they cannot claim them from the United States.

Mr. Justice CATRON delivered the opinion of the court.

The United States sued the Bank of the United States for a dividend on stocks held by the government in the bank, and the defendant pleaded and relied in defence on a set-off, being the damages claimed by the defendant of fifteen per cent. on a protested draft in the form of a bill of exchange, drawn by the government of the United States on the government of France, for a sum of money due from the latter government to the former, by treaty stipulations, to obtain

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possession of which the draft was drawn. The bank was the \*395] payee and original holder. The \*holders at the time of protest (Messrs. Rothschilds of Paris) caused it to be protested for non-payment; and Hottinguer & Co. intervened immediately after, and took up the draft for the honor of the bank. The corporation refunded to Hottinguer & Co. the amount advanced, including interest and charges, together with one half per cent. commissions, and thus again became possessed of the draft.

The Circuit Court, on a former trial, held that the damages claimed as a set-off depended on a statute of Maryland of 1785; that by the statute the holder at the time of protest alone could demand damages from any previous party to a bill, and that if he failed to do so, and recovered less from any previous indorser, the latter could only recover the amount actually paid (with interest and charges accruing subsequently) from the drawer; and therefore the bank could set up no claim by force of the Statute of Maryland, taking its own assumption to be true, that this was a legal bill of exchange, and properly subject to protest. This instruction altogether rejected the defence relied on, and the jury found for the plaintiffs; and from that decision the defendants prosecuted a writ of error to this court. When the cause came before us in 1844 (2 How., 711), this single question was presented for our determination; nor could this court decide any other question; and such was the unanimous opinion of the court, although the judges then present differed as regarded the true construction of the statute of Maryland; the majority holding the construction of the Circuit Court to have been erroneous, and that the bank, as payee, on taking up the draft from Hottinguer & Co., had the same right to demand damages under the statute that the holder had at the time of protest. The court, however, when giving its opinion, threw out some suggestions on the structure of the bill; first remarking, that, "before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel, though, not having been excepted to by the government, it is not a matter for decision." The instruction given cut off every other question the government might have raised in opposition to the set-off claimed; and as this court, when acting as a court of errors, can only legitimately revise the questions of law that have been raised and decided in the Circuit Courts, it must of necessity, on a second writ of error being prosecuted, have power to revise such rulings of the court below on the second



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trial as effect the merits of the controversy, and to pass on the questions not previously presented, as open questions, in the particular cause. However high the regard of judges that did not concur may be for the views entertained and expressed by other judges, on a question of law not brought up for decision, still it is impossible to recognize such views as binding authority, consistently with the due administration of justice; as by doing so the merits of \*the controversy might be forestalled, without proper examination. We therefore feel ourselves at liberty to treat of the structure and character of the instrument before us as an open question. And so, also, we deem the question open, whether the statute of Maryland subjected to protest and damages a government. The statute provides,—“That upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society in any foreign country, and regularly protested, the owner or holder of such bill shall have a right to so much money as will purchase a good bill of the same time of payment, and upon the same place, at the current rate of exchange of such bills; and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, with costs of protest, together with legal interest,” &c. The United States refunded to the bank, on the return of the draft, the principal sum, together with all the charges actually incurred by the bank, and the interest accruing from the date of drawing to the time when the money was refunded; but refused to pay the fifteen per cent. damages claimed by the bank. This refusal was not founded on the true construction of the Maryland statute; the government insisting it had no application to the transaction, but that the drawing was of nation upon nation, and not governed by the law merchant; and that the form of one of the instruments making up the transaction did not and could not alter its character or legal effect, so as to bring it within the law merchant. That the government was only bound to do equity to the bank to the extent of the amount refunded to Hottinguer & Co. And these conflicting assumptions make up the question we are now called on to determine, as will be seen by referring to the third and fourth instructions asked to be given to the jury, on part of the plaintiffs, on the second trial; they are as follows:—

“3. That the bill in question, being drawn by one government upon another, and upon a particular fund, is not a bill of exchange within the legal meaning of the terms, and is not embraced by the statute.

“4. That the defendants, being indorsers of the bill, and

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not the holders or owners at the time of protest, are not entitled to the damages, since they have not paid them."

Being refused, the judge stated to the jury, that "these questions appear to me to have been determined by the Supreme Court of the United States in the present cause in favor of the defendants"; and further remarking, that, "if I am mistaken in their views on this, it will be corrected by a reëxamination of the cause in that court."

That the judge was mistaken as regarded the questions arising on the third instruction, we have already stated; but in regard to the fourth instruction, the charge was proper, as the question presented by it had been decided.

\*397] Suppose, then, a bill of exchange could be drawn by the government of Maryland, or by the government of the United States in this District, as the successor of Maryland, on the government of France; would the statute of Maryland give damages to a holder in case the bill was dishonored by France, and formally protested? The statute provides for damages upon all foreign bills drawn in that State, "on any person, corporation, company, or society."

Is the government of France either a person, corporation, company, or society, within the meaning of the act? If it is, and was indebted, and could be drawn on and protested, then it follows that the drawer of the bill (in such instance as this), on taking it up and paying the damages, could lawfully demand from France, as drawee, the damages paid, and rightfully enforce the demand by the sword, if payment was refused; as the demand would be a perfect right, and this the ultimate remedy. In our opinion, Maryland, by her act of 1785, never contemplated the idea that a foreign government should be subject to be drawn upon by bills of exchange, and to protest and damages as incidents, like individual persons, or trading companies, or corporations; but that the statute had reference to the latter only; and that therefore this bill, on its face, "is not embraced by the statute," in the language of the rejected instruction.

The second consideration arising on the instruction involves the structure and character of the instrument, not so much in form, as in substance; for the name of the instrument cannot change its nature and character. The draft was drawn by one government on another, and of necessity accompanied by other documents, and the question is, was it a negotiable bill of exchange, in the legal meaning of the terms. The Circuit Court held that it was; and this is the prominent legal point in the cause, or at least has been so treated at the

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bar, and on which this court has bestowed much consideration.

A bill of exchange is an instrument governed by the commercial law ; it must carry on its face its authority to command the money drawn for, so that the holder, or the notary, acting as his agent, may receive the money, and give a discharge, on presenting the bill and receiving payment ; or, if payment is refused, enter a protest, from which follows the incident of damages. But if no demand can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill and be presented with it, it cannot be a simple bill of exchange, that circulates from hand to hand, as the representative of current cash.

The draft in question was drawn for 4,856,666.66 francs ; being moneys owing and shortly to become due from France to the United States, according to a treaty stipulation ; and these facts are distinctly set forth on the face of the draft, and by indorsements on it. \*The paper was signed by the Secretary of the Treasury of the United States, [\*398 and addressed to the Minister and Secretary of State for the Department of Finance of the kingdom of France, and was payable to the order of Samuel Jaudon, cashier, &c. The mere signature of our Secretary of the Treasury could not be recognized by the French government as conferring authority on the holder to demand payment. The transaction being one of nation with nation, he who demanded payment must have had not only the authority of this nation before he could have approached the French government, but that authority must have been communicated by the head of this government through the proper department carrying on our national intercourse, which was the State department. Accordingly, of even date with the draft (7 February, 1833), an instrument was drawn up reciting the fact of indebtedment, and cause thereof ; the amount due ; the authority conferred by an act of Congress on the Secretary of the Treasury to apply for the money in such manner as he might deem best ; the fact and manner of drawing for it ; and then comes the official authority to the payee to receive the money, in these terms :—

“Now, therefore, be it known, that I, Andrew Jackson, President of the United States, do ratify and confirm, and approve the drawing of the said bill by the Secretary of the Treasury aforesaid, and do hereby authorize the said Samuel Jaudon, or his assignee of the said bill, to receive the amount

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thereof; and on receipt of the sum therein mentioned, to give full receipt and acquittance to the government of France for the said first instalment, and the interest due on all the instalments, payable on the said second day of February, by virtue of the said convention; and I, Andrew Jackson, President as aforesaid, do hereby ratify and confirm all that may be lawfully done in the premises.

"In testimony whereof, I have caused the seal of the United States to be hereunto affixed. Given under my hand, at the city of Washington, the seventh day of February, in the year one thousand eight hundred and thirty-three, and of the independence of the United States of America the fifty-seventh.

ANDREW JACKSON,

"By the President:

EDW. LIVINGSTON,  
*Secretary of State.*"

This accompanied the draft, and was placed in the hands of the payee, and no doubt passed through the hands of the different indorsees. Still, neither the power more than the draft could be presented to the French government by a mere individual who was holder, or by a notary public, and therefore, on the next day after the draft and power bear date, the Secretary of State of our government addressed a despatch to our *chargé d'affaires* and representative at the French court, in the following terms:—

\*399] "*Department of State, Washington, 8th February, 1833.*

"Nathaniel Niles, Esq., Paris.

"SIR:—The Secretary of the Treasury, in conformity with the provision of a law of the last session of Congress, yesterday drew a bill upon the Minister of State and Finance of the French government, for the first instalment and the interest thereupon, and for the interest upon the remaining instalments; which interest is stipulated to be paid by that government to this in twelve months from the date of the exchange of the ratification of the late convention between the United States and his Majesty the King of the French. The bill is drawn in favor of Samuel Jaudon, cashier of the Bank of the United States, or order, and will go accompanied, to the assignee thereof in France, by a full power from the President, authorizing and empowering him, upon the due payment of the same, to give the necessary receipt and ac-

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quittance to the French government, according to the provision of the convention referred to.

"You will take an early opportunity, therefore, to apprise the French government of this arrangement.

"I am, Sir, respectfully, your obedient servant,

EDW. LIVINGSTON."

Until the French government was thus officially advised, the bill and accompanying power combined were valueless in the hands of the holder, as against France.

It follows, as we suppose, from the character of the drawer and the drawee, and the nature of the fund drawn upon, that this transaction could not be governed by the commercial law; much less by a statute of Maryland, which happened to be in force in the District of Columbia, where the draft was drawn.

But it is insisted, and with much plausibility, that as between the bank as payee, and the United States as drawer, no such objections can be alleged by the United States; they having assumed the draft to be a bill of exchange, and dealt with it as commercial paper, are bound by the assumption. Still, the question meets us, that no form of draft could authorize a legal demand upon the drawee (France) on the face of the draft. So far from being a simple paper, carrying its authority to receive the money with it, the parties now before the court conceded, at the time the drawing took place, by obtaining the power, that the right to receive the money did mainly depend, and must depend, on the power signed by the President, and countersigned by the Secretary of State, with the seal of the United States attached, and the communication of the facts in official form, and through the proper channel, to the government of France, that is, through its Department of Foreign Affairs. These were the conditions and contingencies with which the draft was encumbered. They were legal consequences, apparent \*on its face, [\*400 and are yet more apparent by the accompanying facts that took place at the time of drawing.

Again. This controversy is between the original parties; the law governing the dealing, each was bound to know; the facts they did know equally well; and if a mutual mistake was made in supposing that a negotiable commercial instrument could be founded on our claim against France, this mistake cannot change the commercial law, which in our opinion could not be made to apply to the subject-matter of

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drawing, nor in any form of instrument founded on the subject-matter.

The principal argument adduced to sustain the set-off claimed is founded on the fact, that by an act of Congress the Secretary of the Treasury had a discretion to adopt any appropriate means to obtain the money, and that a bill of exchange was an appropriate means. To this assumption it may be answered, that France was not bound by the act of Congress, but by the treaty; it stipulated, "that the indemnity of twenty-five millions of francs should be paid, in six annual instalments, into the hands of such person or persons as should be *authorized* to receive it." We repeat that this authority was to come from our government to the French government; was to pass through the Department of State here, and through the Department of Foreign Affairs there, and thus only could it reach the Minister of Finance, M. Humann. Our Secretary of the Treasury could not communicate with the Minister of Finance, nor with any other functionary of the French government, and therefore the bill drawn by Mr. McLane on M. Humann, standing alone, was idle as waste paper, notwithstanding the act of Congress, in so far as the French government was concerned. Nor had M. Humann any power to pay the money, had it been in the treasury, until instructed to do so by the Department of Foreign Affairs.

1. For these reasons, we are of opinion that the question on the structure of the bill is an open question, because for the first time presented to this court for decision.

2. That the statute of Maryland, of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government.

3. That a bill of exchange in form, drawn by one government on another, as this was, is not, and cannot be, governed by the law merchant; and that therefore it is not subject to protest and consequential damages.

And on these grounds we order that the judgment of the Circuit Court be reversed, and that the cause be remanded to that court for another trial thereof, on the principles stated in this opinion.

Mr. Chief Justice TANEY filed the following memorandum:—

The Chief Justice withdrew from the bench in the argument of this case, having given an official opinion, when he was Attorney-General of the United States, against the claim

made by the \*bank, and concurring altogether with [ \*401 the above opinion given by the court.<sup>1</sup>

Mr. Justice McLEAN.

I dissent from the opinion of the court. No point is made in this case which was not elaborately discussed and substantially ruled in the same case, reported in 2 How., 711. It is true, the structure of the bill, and the liability of the government to the damages claimed, not being points made in the former bill of exceptions, were not authoritatively adjudged. But these points were so connected with the construction of the Maryland statute, the question then before the court, that neither the counsel nor the court could escape their consideration. No other instrument than a foreign bill of exchange is embraced by the statute, and if the government be not liable to damages on a protested bill, no decision could have been given against it.

The points were as fully and as ably argued then, as they have been at the present term. The addition of one learned counsel at the bar is the only change in the advocates. But the changes on the bench show the uncertainty of life, and the emptiness of human hopes. Two judges, distinguished for their great learning and ability, who participated in the former judgment, have gone to their account; ill health causes the absence of another, and the opinions of the two now present remain unchanged. We submit, as we are bound to do, to the views of our four learned associates who now decide this case.

It is insisted that the bank did not purchase the bill of exchange from the government, but acted as its agent, using the bill as an instrument through which to perform its agency.

By the fifteenth section of its charter the bank, when required by the Secretary of the Treasury, was bound "to give the necessary facilities for transferring the public funds from place to place within the United States or Territories, without charge." But this duty was limited to transfers within the Union, and did not extend to foreign countries.

The correspondence between the Secretary of the Treasury and the president of the bank, in relation to this bill, shows a purchase of it by the bank. In his first letter to the bank, dated the 31st of October, 1832, the Secretary of the Treasury states the amount due under the French treaty; that it

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<sup>1</sup> The opinion of the Attorney-General does not appear among the official opinions published.

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was made his duty to have the amount transferred to the United States, and the views of Mr. Biddle as to the mode of transfer were solicited. In his answer Mr. Biddle says,—“The simplest form would be the sale of a bill on Paris, drawn by the Secretary of the Treasury”; that “the bank has already in Paris a larger sum than it has any immediate use for, yet it is not indisposed to increase it, because it may hereafter have occasion for the fund, and because it is believed that, if \*the terms can be made acceptable, the purchase of \*402] the whole by the bank would be the best operation for the government.” The rates of exchange are then stated, and a proposition to purchase the bill at a certain per cent.

On the 26th of January ensuing, the Secretary says he is ready to draw the bill, and adds,—“I presume the bank is still disposed to purchase, and on the terms offered in your letter of the 5th of November.” And also he says,—“It is desirable that the credit be given to the treasurer by the bank, on receiving the bill.”

To this letter Mr. Biddle replies, that the rate of exchange has declined between England and France, and that the bank could not take the bill on the terms at first proposed. On the 6th of February the new terms were accepted, and on the following day the bill was transmitted, and its proceeds were placed on the books of the bank to the credit of the government.

These facts show a proposal to sell the bill by the Secretary, and an agreement to purchase it by the bank at a certain per cent.; that the bill was drawn and forwarded to the bank, and that for the amount of it a credit was entered to the government. In the face of these statements, which show a purchase of the bill beyond all doubt, it is extraordinary that the fact should be controverted.

It is contended that the bill, “under the circumstances stated in the record, is not a bill of exchange, and is not embraced by the Maryland statute of 1785.”

The Secretary of the Treasury proposed to sell a bill of exchange to the bank, and the bank agreed to purchase a bill. On its face it is called a bill of exchange, and it was negotiated as such by the bank to Baring, Brothers, & Co., of London, and by them to N. M. Rothschild, who indorsed it to Messieurs D. Rothschild, Brothers, of Paris. When the bill became due, a demand of payment was made on the drawee, and a protest for non-payment, which was followed by due notice to the drawer. The government paid the cost of protest and other expenses to the bank, and also the com-



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missions charged by Hottinguer & Co., who took up the bill, *supra* protest, as the agents of the bank; but the fifteen per cent. damages given by the Maryland statute were refused. And in a letter the Secretary of the Treasury, the Attorney-General says,—“I have carefully examined the claims presented by the Bank of the United States, on account of the protest of the bill of exchange drawn by you on the French government,” &c. “The account,” he says, “stated by the bank, if supported by proper vouchers, appears to be correct, with the exception of the claim of fifteen per cent. damages on the amount of the bill.”

But now it seems that these eminent civilians and bankers were ignorant of the legal import of this instrument,—men who had been all their lives conversant with bills of exchange, and who had used them in their moneyed operations annually, to an amount equal to, if \*not greater than, the revenue [\*408 of this government. Yet these men, the richest and most experienced bankers in the world, were mistaken in calling and treating this paper as a bill of exchange. And the government, too, were reprehensible for paying the costs of protests, for such costs could be charged only on a bill of exchange.

Against all this knowledge, experience, and action, it is now contended that the paper is a mere assignment, or any thing else than a bill of exchange. That designation is repudiated, not the less zealously for having been the result of second thought.

But what are the new lights shed upon this question?

Two documents are found in the present record, which were not before the court at the former argument; and these, it is said, have a material bearing on the case. The first is a letter dated 8th February, 1833, from the Secretary of State to Mr. Niles, our *chargé d'affaires* at Paris, informing him that a bill had been drawn on the French government for the first instalment and interest under the treaty, in favor of Samuel Jaudon, cashier of the Bank of the United States, and requesting that notice should be given of the arrangement to the French government.

This is nothing more than a letter of advice, which usually precedes a bill of exchange, of which the payee in this instance had no knowledge. It, however, conduces to show the nature of the transaction, as not only the substance of a bill of exchange was regarded, but also its form and accompaniment.

The other document was under the seal of the United States, and signed by the President and Secretary of State.

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It stated the substance of the treaty; the act of Congress authorizing the Secretary of the Treasury to have the instalments, as they became due, transferred to the United States; and that the Secretary had drawn a "bill on the Minister and Secretary of State for the Department of Finance of the French government, payable at sight, for four millions eight hundred and fifty-six thousand six hundred and sixty-six francs and sixty-six centimes, being the amount of the first instalment, payable to the United States, under the said convention, on the second of the present month of February, and of the interest which is payable at the same time; which bill is payable to Samuel Jaudon," &c., and the President ratifies the act of drawing the bill, and the receipt which shall be given, &c.

Now this paper is supposed to take away from the bill of exchange its character as a commercial instrument. It can have no other effect than to show that the Secretary had authority to draw the bill. It was no part of the bill of exchange, and indeed was not necessary to its negotiability. The indorsement of Jaudon implied an undertaking that he was the cashier of the bank, and that the bill was genuine and would be paid. No one can doubt that the payment of the money by the French government on the bill, without any additional evidence, would have been good. The bill \*404] upon its face \*was perfect, and authorized the holder to receive and receipt for the money.

At most, the document can only be considered as authenticating the law under which the Secretary acted in drawing the bill. And this was all that the French government, under any circumstances, could require. But suppose this paper was a power of attorney, signed by the President, authorizing the Secretary to draw the bill; would that change or in any way effect its commercial character?

Any person may draw, accept or indorse a bill by his agent. A partner may indorse for the firm. And this authority may be by parol or writing not under seal. So a corporation may draw by its agent. Banks are in the constant practice of drawing bills through their cashiers. And has it ever been supposed, that, if evidence accompanied or was attached to the bill of the authority of the drawer, it impaired its commercial properties? Mr. Chitty says, in his Treatise on Bills (p. 27),—"Where a bill is not signed by the party himself, the party taking it must first satisfy himself that the agent had power so to act for the supposed principal." In the case of the *East India Company v. Tritton*, 3 Barn. & C., 280, three bills upon the East India Company were payable to

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Hope or order; they got into possession of Card, who indorsed them for Hope. Card had a power of attorney from Hope, but it was not sufficient to warrant these indorsements. This power being seen by the holders of the bill, they were bound by it, as having notice of its extent.

But a bill drawn by an agent, under a power, was never supposed to be less a bill than if it had been drawn by the principal. And in such cases the assignee has only to satisfy himself that the drawer acted under a proper authority. This no more vitiates the bill, than evidence of the genuineness of the signature of the drawer. The bill in question was complete upon its face, and it is inconceivable to me how the paper signed by the President can affect it.

In the argument it is supposed that, in drawing this bill, the government acted in its sovereign capacity. The idea of attaching sovereignty to all the agencies of the government, however exercised, is as novel as it is unconstitutional. Cover every transaction of the agents of the government by the attributes of its sovereignty, and a despotism, characterized by the *grossest* acts of injustice and oppression must result.

A bill of exchange derives all its properties from the commercial law. It is a most convenient instrument for the transfer of funds from one country to another. And its chief and only value, in this respect, arises from the legal principles with which it is invested, and which regulate the duties and liabilities of those who become parties to it. In negotiating such an instrument, the government does not act in its sovereign capacity. It becomes subject, like all other parties to the bill, to the commercial principles which govern it.

\*In the case of the *United States v. Administratrix of Baker*, 12 Wheat., 559, it was held, that "whenever [\*405 the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence in order to charge the indorser as in a transaction between individuals." And in that case the indorser was held to be discharged by the negligence of the government. And again, in the *United States v. Bank of the Metropolis*, 15 Pet., 392, the court say,—“When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference except that the United States cannot be sued.”

These decisions, and many others that might be referred to, put an end to the assumption, that a bill of exchange

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drawn by the government is an act of sovereignty, or any thing different in principle from a bill drawn by an individual. Whether drawn by the government or an individual, a bill of exchange is the same commercial instrument, and subject to the same law. No principle is better settled than this by the decisions of this court.

But it is supposed that there is something in the character of the drawee, the French government, which destroys the commercial character of the bill. This position is as unsustainable as that of the character assumed for the drawer. The bill was drawn on M. Humann, the Minister of Finance of the French government. The money was due, and the payment of it was subject to no contingency from the face of the bill, nor from any circumstance connected with it. The drawer guaranteed the payment of the bill on presentation by the holder, under all the responsibilities which the law attached. A demand, protest, and notice were the only conditions on which the responsibilities were to become fixed. These conditions have been performed by the bank, and the government has acknowledged its liability by paying a part of the damages claimed. But throwing itself upon its sovereignty, the government refuses to pay the damages claimed under the statute of Maryland, on the ground that the instrument is not a bill of exchange. If this ground be true, the costs of protest should not have been paid by it.

It is contended, that, as the question is now here, between the original parties to the bill, the bank may be supposed to have taken the bill under a full knowledge that it might not be paid by the French government; and could not be paid by it, unless the chambers should make an appropriation. And from this knowledge it is inferred, that the bank took upon itself the risk of the punctual payment of the bill. This assumption is shown to be unfounded by the fact, that the government, on being notified of the protest, immediately returned the money to the bank which it had paid on account of the bill. Now if there had been any understanding, express or implied, such as is presumed, in regard to the punctual payment of the bill, would the government have done this? There can be but one answer to this question.

There was no doubt in the minds of the original parties to this bill, that it would be paid on presentation. What was the language of this government on receiving notice of the protest? Was the failure of the French Chambers to make the appropriation received as an apology for the dishonor of the bill? That government was informed, in terms not to

be misunderstood, that no excuse for a delay of payment could be received. That the obligation of the French government was absolute, and in no degree dependent on the will of the Chambers; and an immediate payment was required. The bank, shortly after the receipt of this bill, indorsed it to Baring, Brothers, & Co., in London. This affords the highest evidence that the bank believed the bill would be honored.

It is argued that the French government did not subject itself to a bill of exchange, and consequently to the payment of damages on a default of payment. This may be admitted, and yet it does not reach the question. The bill was not presented until the money was due, and by drawing it our own government undertook that it should be paid. This is as well settled as any other principle in the commercial law.

It seems to be considered that the case might have been stronger against the government, had it been made by an indorsee of the bill. This cannot be correct. Every indorsee, from the face of the bill, had all the notice which can be charged against the bank.

But it is contended that the bill was drawn on a particular fund, and therefore was not a bill of exchange.

It is admitted, if the payment of the bill is made to depend upon any contingency, it is not a bill of exchange. In the language of Mr. Chitty,—“If the payment is to depend on the sufficiency of a particular fund, the bill or note will be invalid.” The case of *Jenny v. Herle*, 2 Ld. Raym., 1361, was much relied on in the argument. “Herle sued Jenny upon a bill drawn by him upon Pratt, and payable to Herle, as follows:—‘Sir, you are to pay Mr. Herle £1945 out of the money in your hands belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of West Buckland.’ Herle had judgment in the Common Pleas; but upon a writ of error, the Court of King’s Bench held that this was no bill of exchange, because it was only payable out of a particular fund, *supposed* to be in Pratt’s hands, and the judgment was accordingly reversed.”

The decision in that case did not turn upon the words on the face of the bill, “being part of the consideration-money for the purchase of the manor of West Buckland”; but on these,—“You are to pay Mr. Herle out of the money in your hands belonging to the proprietors of the Devonshire mines.” The former words here cited in effect are the same as those used in the French bill, \*showing the consideration on which it was drawn; but in Herle’s case these words

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constituted no objection to the bill, and were not referred to by the court. The case turned exclusively on the direction to "pay out the money in your hands belonging to the proprietors of the Devonshire mines." Had these words been omitted, the bill would have been good. So that the case of *Herle*, so much relied on by the plaintiffs' counsel, does not show the invalidity of the French bill.

The bill in *Herle's* case, in the language of the court, was payable out of money *supposed* to be in Pratt's hands. Consequently it was payable out of no other fund. And if the fund supposed to be in Pratt's hands was not there, then the bill was not payable. Compare this with the French bill:—"Sir, I have the honor to request you to pay at sight of this my first of exchange, &c., to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four millions eight hundred and fifty-six thousand six hundred and sixty-six francs sixty-six centimes, which comprises the sum of 3,916,666.66 francs, constituting the amount of the first payment to be made to the United States, by virtue of the convention concluded between the United States and France, the 4th of July, one thousand eight hundred and thirty-one (deduction made of the amount of the first payment, reserved to France by said treaty), and the additional sum of nine hundred forty thousand francs, for a year's interest at four per cent. upon the entire sums payable to the United States, dating from the day of the exchange of ratification to the second of February, 1833."

Now there is not on the face of this bill any intimation out of what fund the French government should pay it. It specifies on what account the bill was drawn, showing the amount was due; but this does not affect the character of the bill. The instalment "was referred to," in the language of Mr. Chitty, "in order to show the consideration, and not to render the payment contingent."

In *Burchell, Administrator, &c. v. Slocock*, 2 Ld. Raym., 1545, the action was on a promissory note, whereby the defendant promised to pay to A. B. £101 12s. in three months after the date of the said note, "value received out of premises in Rosemary Lane, late in the possession of G. H. The court, on demurrer, held this to be a promissory note within the statute." And so in *Hausoullier v. Hartsinck*, 7 T. P., 733, the defendant promised to pay ———, or bearer, £25, being a portion of a value as under deposited in security for the payment thereof. Upon a special case being reserved, the court said they were clearly of opinion, that though, as between the original parties to the transaction, the payment of the

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notes was to be carried to a particular account, the defendants were liable on these notes, which were made payable at all events.

The question is, whether the payment of the bill is made to \*depend upon any contingency. Now, it is clear...[\*408 this is not done in the French bill. It is made payable absolutely, without any condition expressed or implied.

The maker of a note promised to pay A. B. eight pounds, so much being to be due from me to C. D., my landlady, at Lady-day next, who is indebted in that sum to A. B. Was held not to be conditional. Chitty on Bills, 139. Now, in this instrument the consideration is stated; but that did not vitiate the note. The French bill states nothing more, than that the amount drawn for was due by treaty. And yet this is supposed to destroy its negotiable character. A decision to this effect would, in my judgment, introduce a new principle into the law governing bills of exchange.

Is the bank entitled, under the statute of Maryland, to the fifteen per cent. damages?

The argument that the State of Maryland did not intend to subject her sovereignty to the provisions of the statute is entitled to but little consideration. The interest involved does not reach the sovereignty of the State; and it is sufficient to say, there is no exemption of the interests of the State in the statute; and in passing it, the legislature intended, as in the enactment of every other law, that all legal effect should be given to it.

The words of the statute are, "that upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society in any foreign country," &c.; and it is intimated that these words do not embrace a foreign government. In answer to this, it may be said the bill is drawn on M. Humann, and is literally within the statute.

From the cases above cited, it is clear that the government, in drawing or negotiating a bill of exchange, subjects itself to all the liabilities of an individual; consequently it is liable to the fifteen per cent. damages, under the Maryland statute, if the bank is entitled to them. These damages were considered by this court in the former decision as designed by the statute to cover reëxchange. This construction is opposed, and it is argued that reëxchange is provided for in the statute, where it declares that the holder of a protested bill "shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bill."

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And the fifteen per cent. damages in this view are considered as a penalty.

Instead of covering reëxchange by the above provision, the legislature intended to give the holder of the protested bill the money he paid for it, varying only as the rate of exchange should be at the time. If the rate of exchange at the protest of the bill was lower than when it was purchased, the holder, under the statute, would recover less than he paid for it; but if exchange had risen, he would recover more. Now, this exchange \*409] is limited to this \*country, and therefore cannot have been intended as reëxchange. Reëxchange is a bill drawn at the place of payment of the protested bill, which shall sell for the amount of such bill. The holder of the French bill, on its protest, was entitled, on commercial principles, independently of the statute, to a bill on this country which would sell at Paris for the amount of the protested bill. This would be a very different sum from that which was paid for the bill in this country. The reëxchange depends upon the state of trade between the two countries, direct and circuitous, the money market, always regulated by the demand and supply, and other circumstances of a local character, which show that the price at which the bill was purchased in this country can never be the price at which a bill on this country would sell at Paris, or in any foreign country. This fact being known to the legislature of Maryland, they could not have intended by the above provision to cover reëxchange. The statute gives to the purchaser of the bill the amount he paid for it, with the small variation stated, and nothing more. The fifteen per cent. damages were given in lieu of reëxchange, and not as a penalty. This is the view taken by the court in its former decision.

It is said that the bank, not having paid damages on the bill, is not entitled to them. The bank, having negotiated the bill, was responsible for its payment, with damages. And after the protest, the agents of the bank supervised, and paid the amount of it to the holder. The propriety of this payment is not questioned. By this act, the bank became the holder of the bill, not as indorsee, but as the original payee. In effect, this ownership obliterated and annulled the indorsements on the bill. The bank, as the holder, could look to no one but the government for payment. And payment to the bank in this country was made, shortly after notice of protest was received.

But the damages given by the statute have been withheld. Had the bank never negotiated the bill, and made a demand of payment, the protest for non-payment, with regular notice,



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the right to the damages claimed could not have been contested. And this is the precise condition of the bank. It is the holder, having paid the amount of the bill at Paris.

The large amount of the damages claimed has been adverted to in the argument. This should have no influence on the legal questions that arise.

Suppose the bank had not taken up the bill after protest; is there any doubt that the holders could have recovered damages from their indorsers, and they from the bank? This would have subjected the bank to the payment of the damages given by the law of the place where the bill was first indorsed. But this circuitous course was prevented by the payment of the bill. It thus appears that the bank paid this large sum of money in Paris, \*unexpectedly, which in the nature of \*[410 things must have subjected it to great inconvenience and loss. By the payment, the credit of the government, as the drawer of the bill, was sustained, and the eventual liability of the bank for principal and damages anticipated.

Now, as between individuals, this would entitle the holder of the bill to the fifteen per cent. damages. And it is equally clear and just, that the bank should receive the same. There has been paid to it by the government the principal, costs of protest, and the commission charged by Hottinguer & Co. as the agents of the bank, who took up the bill, but not one cent has been paid to the bank for the advance of the money at Paris. On the principles of equity, independently of the statute, the bank is entitled to the difference in value of the sum paid by it in Paris, and the sum received by it from the government in this country. This is reëchange, which the fifteen per cent., in my opinion, was intended to cover. Of this opinion was the court which formerly decided this case.

I think the judgment of the Circuit Court should be affirmed.

Mr. Justice WAYNE also dissented from the opinion of the court.

Mr. Justice WOODBURY, having given an official opinion as Secretary of the Treasury against the claim of the bank in this case, did not sit.

#### ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged

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by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

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MALINDA FOX v. THE STATE OF OHIO.

The power conferred upon Congress by the fifth and sixth clauses of the eighth section of the first article of the constitution of the United States, viz.:—"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures"; "To provide for the punishment of counterfeiting the securities and current coin of the United States";—does not prevent a State from passing a law to punish the offence of circulating counterfeit coin of the United States.<sup>1</sup>

<sup>1</sup> FOLLOWED. *Moore v. Illinois*, 14 How., 20 (but see *Id.*, 21). CITED. *Passenger Cases*, 7 How., 556. See *Ex parte Houghton*, 8 Fed. Rep., 898, 902; s. c., 7 Id., 659; *United States v. Yates*, 6 Id., 864; *Dashing v. State*, 78 Ind., 358; *State v. Oleson*, 26 Minn., 517.

*United States v. Field*, 16 Fed. Rep., 778; *Brown v. Evans*, 8 Sawy., 493.

In *Fox v. State*, the Court arrived at the conclusion that the State punished one offence, and the United States another, and therefore there was no conflict of authority. Other cases are of the same kind. *Commonwealth v. Tenney*, 97 Mass., 50. Other cases are put upon the express ground that the Act of Congress expressly permitted State courts to punish the crime for which the criminal was prosecuted. *Commonwealth v. Fuller*, 8 Metc. (Mass.), 313. The permit was held constitutional. In several other State courts parties were indicted for offences relating to the current coin of the United States, and no exception was taken to the jurisdiction. *Peek v. State*, 2 Humph. (Tenn.), 78; *Rosnick v. Commonwealth*, 2 Va. Cas., 356; *State v. Collins*, 2 Hawks (N. C.), 191; *State v. Bowman*, 6 Vt., 594; *Miller v. People*, 2 Scam. (Ill.), 233; *Rouse v. State*, 4 Ga., 136. Some cases expressly put it that such acts are unconstitutional because

Congress having express power to punish counterfeiting, no State can legislate upon the subject. *Mattison v. State*, 3 Mo., 421. Other cases hold that it is an offence against two jurisdictions, and each may punish it. *Chess v. State*, 1 Blackf. (Ind.), 198; that the power to punish such an offence is inherent in the State, to protect her citizens. *State v. Tutt*, 2 Bail. (S. C.), 44; *State v. Antonio*, 2 S. C. (O. S.), 776; *People v. White*, 34 Cal., 183; *State v. McPherson*, 9 Iowa, 53; *Jett v. Commonwealth*, 18 Grant. (Va.), 933; *State v. Brown*, 2 Oreg., 221; *Sizemore v. State*, 3 Head (Tenn.), 26; *State v. Antonio*, 3 Brev. (S. C.), 562; *Sutton v. State*, 9 Ohio, 133; *State v. Pitman*, 1 Brev. (S. C.), 32; *Hendrick v. Commonwealth*, 5 Leigh (Va.), 707; *State v. Rankin*, 4 Coldw. (Tenn.), 145; *Long v. State*, 10 Tex. App., 186; *State v. Randall*, 1 Aik. (Vt.), 89; *Darling v. State*, 78 Ind., 557. And perhaps a party who steals money out of mail bags may be punished under the United States laws, for violating the postal laws, and under the State laws, for theft. *United States v. Amy*, 14 Md., 149, n., 152.

The indictment must charge the offence as one against the State, and not against the United States. *Harlan v. People*, 1 Doug. (Mich.), 207. In Massachusetts it is held that, since the passage of the Act of Congress,

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\*The two offences of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is [\*411 an offence directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached.<sup>2</sup>

The prohibitions contained in the amendments to the constitution were intended to be restrictions upon the federal government, and not upon the authority of the States.<sup>3</sup>

punishing national bank officers for embezzlement, an accessory to such embezzlement by an officer of a national bank cannot be indicted for a felony under the State law, even though he is not indictable in the federal court. *Commonwealth v. Felton*, 101 Mass., 204. So in the United States District Court of Vermont it was decided that the federal courts had exclusive jurisdiction over the offence of passing counterfeit national bank bills, and where a person was imprisoned by a State court upon a charge of such an offence, a writ of *habeas corpus* would be issued to release him. *Ex parte Houghton*, 2 Crim. L. Mag., 759; see *Commonwealth v. Ketner*, 1 Id., 227; *Luberg v. Commonwealth*, Id., 779. A State court cannot punish one violating the United States laws, as to perjury. *People v. Kelly*, 38 Cal., 145; *State v. Adorne*, 4 Blackf. (Ind.), 147; *State v. Pike*, 15 N. H., 83. The case of *People v. Kelly* was one of perjury committed to obtain a land patent, and it was held that the offence could not be punished in the State courts. To the same effect are other cases. *People v. Sweetmore*, 8 Park. Cr., 358; *Sherwood v. Burns*, 58 Ind., 502. *Contra*, *Rump v. Commonwealth*, 6 Carey (Pa.), 475.

<sup>2</sup> EXPLAINED. *United States v. Marigold*, 9 How., 568. CITED. *Coleman v. Tennessee*, 7 Otto, 537, 539; *Tennessee v. Davis*, 10 Id., 278; *Ex parte Siebold*, 14., 390.

<sup>3</sup> FOLLOWED. *Twitchell v. Commonwealth*, 7 Wall., 327. CITED. *Smith v. Maryland*, 18 How., 76; *Withers v. Buckley*, 20 Id., 91; *Edwards v. Elliott*, 22 Wall., 557; *United States v. Cruikshank*, 2 Otto, 552. The clause in the Constitution of the United States that "no person shall be . . . subject, for the same offence, to be twice put in jeopardy of life or limb," bind only the United States, and does not extend to the several States. *United States*

*v. Keen*, 1 McLean, 429; *United States v. Gibert*, 2 Sumn., 19; *Jackson v. Wood*, 2 Cow. (N. Y.), 819; *Livingston v. Mayor of New York*, 8 Wend. (N. Y.), 85; *Colt v. Eves*, 12 Conn., 243; *Baker v. People*, 3 Cow. (N. Y.), 686; *Hoffman v. State*, 20 Md., 425; *Contra*, *State v. Moor*, Walk. (Miss.), 134; *People v. Goodwin*, 18 Johns. (N. Y.), 187; *Commonwealth v. Purchase*, 2 Pick. (Mass.), 521.

The law also is well settled that the municipality may punish for the same act that is an offence both against a State law and a town or city ordinance. The proceeding under the ordinance is regarded as a civil suit to enforce a penalty, although the judgment rendered is enforced by imprisonment. When the town or city prosecutes the offender, it is for an offence against the town or city only, and not against the State. *Rogers v. Jones*, 1 Wend. (N. Y.), 261; *Mayor v. Allaire*, 14 Ala., 400; *Mayor v. Rowe*, 8 Ala., 515; *Inhabitants of v. Mullins*, 13 Ala., 341; *Mayor v. Hyatt*, 3 E. D. Smith (N. Y.), 156; *People v. Stevens*, 13 Wend. (N. Y.), 341; *Blatchley v. Moses*, 15 Wend. (N. Y.), 215; *Amboy v. Sleeper*, 31 Ill., 499; *State v. Crummey*, 17 Minn., 72; *State v. Oleson*, 26 Minn., 507; *Levy v. State*, 6 Ind., 281; *Brownville v. Cook*, 4 Neb., 101; *Greenwood v. State*, 6 Baxt. (Tenn.), 567; s. c., 32 Am. Rep., 539; *St. Louis v. Bentz*, 11 Mo., 61; *State v. Gordon*, 60 Mo., 883; *State v. Ludwig*, 21 Minn., 202; *Shaffer v. Mumma*, 17 Md., 331; *Bloomfield v. Trimble*, 54 Iowa, 399; s. c., 37 Am. Rep., 212; *Fennell v. Bay City*, 36 Mich., 186; *Chicago Packing &c. Co. v. Chicago*, 88 Ill., 221; s. c., 30 Am. Rep., 546; *McRea v. Americus*, 59 Ga., 168; *Hamilton v. State*, 3 Tex. App., 643. *Contra*, *Savannah v. Hussey*, 21 Ga., 80. See Mr. Thompson's Essay on "Once in Jeopardy," 4 Crim. L. Mag., 487.

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THIS case was brought up by a writ of error, issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Ohio.

It was an indictment, in the State court, against Malinda Fox, for "passing and uttering a certain piece of false, base, and counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin currently passing in the State of Ohio, called a dollar."

Being convicted, the case was taken by her, upon writ of error, to the court in bank of the State, its highest judicial tribunal; and at the December term, 1842, of that court, the judgment of the Common Pleas was affirmed.

From this decision of the court in bank the plaintiff in error brought the case to this court, and claimed a reversal of the judgment, on the ground that the courts of that State had no jurisdiction of the offence charged in the indictment, but that the jurisdiction belongs exclusively to the courts of the United States.

The cause was argued by *Mr. Convers*, for the plaintiff in error, and *Mr. Stanberry* (Attorney-General of Ohio), for the State.

The opening and closing arguments of *Mr. Convers*, for the plaintiff in error, have been consolidated, and will be found after that of *Mr. Stanberry*.

*Mr. Stanberry* made the following points:—

1. That the offence charged in the indictment is not for uttering any counterfeit of the coin of the United States, or of any foreign coin regulated by Congress, or made current money of the United States.

2. That, if it should be held that the coin so passed was a counterfeit of any of the current coin of the United States, that for the mere offence of uttering there is no jurisdiction in the courts of the United States, but it exclusively belongs to the courts of the State. 1 East, P. C., 162; 1 Hale, P. C., 19, 188; 1 Hawk. P. C., 20.

3. That if not exclusive, the jurisdiction of State courts is concurrent with those of the United States. Federalist, No. 32; *Houston v. Moore*, 5 Wheat., 1, 31; *State v. Antonio*, 3 Wheel. Cr. Cas., 508; *State v. Tutt*, 2 Bail. (S. C.), 44; *Chess v. State*, 1 Blackf. (Ind.), 198; *White v. Commonwealth*, 4 Binn. (Pa.), 418.

1. The first question which arises upon the transcript is as  
 \*412] to the character of the piece of coin which the plaintiff in error has been convicted of passing. It seems

to be taken for granted by her counsel, that it was a counterfeit of some piece of coin which, under the laws of Congress, has been made current money of the United States. The only description given is, that it was a piece of coin in the similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar.

The silver coins which have been made current by acts of Congress are the following:—

All silver coins of the coinage of the mint of the United States; Spanish milled dollars; Spanish pillar dollars; French crowns; the five-franc pieces; and the dollars of Mexico, Peru, and Bolivia.

The Congress of the United States, in the exercise of the power to coin money and regulate its value and the value of foreign coin, has not seen fit to regulate the value of any other foreign silver coins than those above mentioned. The power to punish offences respecting the coin, vested in Congress by the sixth clause of the eighth section of the first article of the constitution of the United States, is limited to the counterfeiting of the current coin of the United States. No coin can be said to be current coin of the United States but that which has been made so by actual coinage at the mint, or by some act of Congress regulating its value.

Here, then, is a power given, in the most unlimited terms, to regulate the value of all foreign coins, and to make them current money of the Union; and a further power to punish the counterfeiting of the coin so made current. Obviously the power of punishment, in other words, the jurisdiction over offences against the coin, is limited to the currency so established. The power to punish arises out of the exercise of the power to regulate. Does it then appear that the piece of coin, which the plaintiff in error was convicted of passing, was a counterfeit of any of the coins so made current by Congress?

There is no term of the description given of this coin which can be relied upon as bringing it within the coin made current by Congress, except the words "good and legal silver coin." Now, if that description of the coin can only refer to the national currency, and could only be satisfied by proof that the counterfeit dollar was in the similitude of an American, Mexican, Peruvian, or Bolivian dollar, all which are established by act of Congress, then it would be sufficient.

No such limited signification can be given to these words. If the averment was "good and legal silver coin of the United States," it would be different; but it is "good and legal silver coin, currently passing in the State of Ohio."

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But there is a certain test of the meaning of this descriptive allegation, and that is, to inquire whether a conviction \*418] under this indictment could have been had, upon proof of passing a counterfeit in the similitude of any of the foreign silver coins of the denomination of a dollar not made part of our national currency by act of Congress.

In order to this, we must look at the statute of Ohio creating the offence, as well as at the indictment.

The words of the statute are:—"That if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," &c. 29 Ohio St., 186.

There can be no question that this provision covers every description of coin, domestic and foreign, whether made current by act of Congress or not. Take, then, the case of passing a counterfeit of a German dollar, which is a description of coin not made current by act of Congress, and what difficulty would be in the way of a conviction under this statute and indictment.

It may be claimed, by the plaintiff in error, that the words "good and legal silver coin currently passing in the State of Ohio," though not used in the statute, yet make a descriptive averment of some coin made legal or current by act of Congress. If that be so, there is no question that the averment, though unnecessarily made, must be proved, upon the familiar doctrine that all merely descriptive allegations become material.

Now, these words, "good and legal coin," are not found in that clause of the constitution which gives to Congress the power to regulate the coin, or in the other clause which provides for the punishment of counterfeiting; but the descriptive words there used are "current coin of the United States." These last are the operative words which distinguish the national coin from the mass of the currency.

It may be argued, that *legal coin* can only mean current coin of the United States, as none other is legal. That is true in one sense. If we were now engaged in the construction of a contract to pay money, in which the payment was stipulated to be made in good and legal coin, the meaning undoubtedly would be current coin of the United States; for it is only that sort of coin which can discharge a contract to pay money, or which is a legal tender in payment. But we are not now looking for the meaning of these words as used in a contract, but in an indictment for passing counterfeit

money. Coin, which may not be legal for the payment of a debt, may yet be legal as a currency; although not regulated in value by act of Congress, it is yet lawful as a circulation. It seems to me there can be no question that the latter is the true sense in which these words are used in the indictment, especially when we take the whole sentence,—“good and legal silver coin currently passing in the State of Ohio”; and that, instead of being descriptive of a particular coinage, they are merely descriptive of the genuineness \*and lawfulness of the original which has been counterfeited, and [\*414 are put in opposition to the other words used in the indictment,—“forged, base, and counterfeit,”—to express exactly the contrary.

2. The constitution authorizes Congress “to provide for the punishment of counterfeiting the securities and current coin of the United States.”

The plaintiff in error has been convicted of passing a counterfeit dollar. I claim, that though it be admitted this coin was of the current coin of the United States, yet the offence of uttering or passing it is not an offence cognizable by the United States.

This leads to a consideration of the meaning of the term “counterfeiting,” as used in the constitution. It is claimed for the plaintiff in error that it is a generic term, and includes every offence in relation to the coin.

This clause does not carry with it a power to define and punish the offence, as is the case in the clause in relation to piracies and felonies committed on the high seas, but is strictly limited to the punishment of an offence named and designated. The consequence is, that, in the absence of any grant of power to define or enlarge, the jurisdiction of the United States is to be confined to the very offence so named,—the offence of counterfeiting. What, then, is the meaning of this term, as used in the constitution? It is nowhere defined in the constitution itself, so that we are to find its meaning elsewhere. At the time the constitution was framed, the offence of counterfeiting was well known and certainly defined; and in that country from which it was adopted, it stood among the class of crimes which amounted to high treason.

It was never understood that the offence of counterfeiting the coin of England, and the offence of passing coin so counterfeited, were the same. On the contrary, they were carefully distinguished and defined; the one amounting to treason, the other to simple felony or misdemeanour.

Speaking of the English statutes against this species of treason, Mr. East, in his P. C., vol. 1, p. 162, says:—“It is

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first to be seen what is a counterfeiting within these statutes. There must be an actual counterfeiting, either by the party himself or by those with whom he conspires. A mere attempt to counterfeit, such as preparing the materials or fashioning the metal, is not sufficient, except in those particular instances which have been so declared by statute."

So, too, in *Hale*, P. C. (p. 19):—"What shall be a counterfeiting? Clipping, washing, and filing of the money, for lucre or gain, any of the proper money of the realm, or of other realms, allowed to be current by proclamation, not within this statute, but made high treason by Stat. 5 Eliz., but no corruption of blood or loss of dower. Impairing, diminishing, falsifying, scaling, or lightening the proper money \*415] of this realm, or the money of any \*other realm made current by proclamation, their counsellors, consenters, and aiders, within neither of the former, but made treason by the statute of 18 Eliz., but without corruption of blood or loss of dower."

Several of these modes of debasing the coin were not understood to be within the common law offence of counterfeiting; for it is said by *Hale*, in reference to the statute against clipping the coin, that it was "introductive of new laws."

1 *Hawk*. P. C., 20, is yet closer to the point. "High treason, respecting the coin, is either with respect to counterfeiting the king's coin, or with respect to bringing false money into the realm. As to the first branch of counterfeiting, it is declared, by 25 Ed. 3, c. 2, 'that, if a man counterfeit the king's money, he shall be guilty of high treason.' As to what degree of counterfeiting will amount to high treason, it is said that those who coin money without the king's authority are guilty of high treason within this act, whether they utter it or not; and that those who have the king's authority to coin money are guilty of high treason if they make it of baser alloy than they ought; and that those also are guilty of the same crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, &c., are not within the statute. But it seems that those who barely utter false money made within this realm, knowing it to be false, are neither guilty of high treason, nor of a misprision thereof, but only of a high misprision."

Further, in 1 *East*, P. C., p. 178, under the title, "Receiving, uttering, or tendering of counterfeit coin," it is said:—"These may amount to different degrees of offence, according to the circumstances. If A. counterfeit the gold or silver coin current, and by agreement before such counterfeiting B. is to receive and vent the money, he is an aider and abettor



to the act itself of counterfeiting, and consequently a principal traitor within the law." "But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanour, before the statute 15 Geo. 2, hereafter mentioned; yet, if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treason, and therefore a misprision of the same. In like manner, I have before shown that the statutes against the importation of false money do not extend to the receivers, not having taken any part in the bringing in of such money."

These authorities show conclusively that the term "counterfeiting" has had a long and well-established meaning; that it is confined to the act of making or debasing; that those only are guilty who are engaged in the act, either as principals or abettors; and that the mere uttering of the false money so manufactured by another belongs to another and lower class of offences.

\*Now, how can it be said that this term is used in the constitution in any new or enlarged sense, as *nomen* [\*416 *generalissimum*, including the passing, vending, receiving, and unlawful possession of false coin, as well as the making and unlawful possession of the instruments for counterfeiting, and all the other like offences which are found in the criminal laws of the several States? If we give this term its meaning at the common law, or its more enlarged signification in the English statutes in existence at the adoption of the constitution, it will not include any of these lesser offences.

It is certainly to be understood that the learned men who framed the constitution were well advised of the true meaning of this term, and if they intended to use it in any new sense, that intention would have been expressed.

But I think it quite clear, not only from the use of a well-known term, but from the nature of the thing, that it was used expressly according to that meaning.

This criminal jurisdiction was given to the United States in aid of its duty to coin money and regulate its value.

The coining and legitimation of money are prerogatives of the sovereign power. (1 Hale, P. C., 188.) The laws of England vest this power in the king; and, to secure it, they declare that the offence of counterfeiting alone shall amount to high treason. It was not found expedient or necessary to guard this royal prerogative by making any lesser offence touching the coin a matter of *lese majestie*.

The constitution of the United States very wisely vests the same prerogative in the federal government; and, follow-

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ing the English laws, it vests along with the prerogative the power to punish the single offence, which in England was found to be the most dangerous invasion of the power. The prerogative is to coin good money, and regulate its value, and the offence is to coin bad money, and impair the value of the good. The power to punish is simply given in aid of the prerogative, and goes no further than the offence which directly and necessarily impairs it.

3. If the court should be against the defendant in error upon the foregoing points, we are next to consider the more important question, whether the States have jurisdiction over offences against the current coin of the United States.

Such a jurisdiction, if not indispensable, is to the last degree useful and expedient. And it has been exercised almost, if not quite, universally by the different States which compose the Union. The rightfulness of this jurisdiction is now, for the first time, questioned in this court. Certainly it presents a question of the first magnitude, for no one can foresee what may be the consequences of taking from the States the power of self-protection, which they have so long exercised, against a class of criminals swarming over the entire Union, and against a species of crime which, more than any other, affects the common business of the people.

\*417] \*The argument against the exercise of this jurisdiction by the States proceeds upon the ground that it exclusively belongs to the courts of the United States, and that it arises out of the provisions of the constitution giving to Congress the power to coin money, regulate its value and the value of foreign coin, and to punish the counterfeiting of the current coin of the United States; and out of the exercise of these powers by Congress in the enactment of laws regulating the coin, and providing punishment for the offence of counterfeiting.

The question is simply one of criminal jurisdiction over an offence cognizable in every State of the Union, either at the common law or by virtue of State legislation.

It is clear, in the first place, that this branch of criminal jurisdiction belonged to the States, respectively, before the adoption of the constitution; and that it continues with them, unless it has been wholly surrendered to the federal government. It is also clear, that there is no express prohibition in the constitution to the exercise of this jurisdiction by the States. The exclusion of State jurisdiction is argued from the fact that the constitution vests a jurisdiction over this offence in the United States, by authorizing Congress to pass laws for its punishment, which jurisdiction, it is said,

must necessarily be exclusive. We deny this inference, and claim that the jurisdiction may be concurrent.

The mere grant of a power in the constitution has never been held to divest the States of the power so granted. There must be something more; either a prohibition, a grant in exclusive terms, or a manifest incompatibility.

Take, for instance, the power to levy taxes. This is granted in the constitution, but no one has ever supposed that thereby the States divested themselves of this power. So, too, in the clause granting to Congress the power to coin money; inasmuch as this power existed in the States as independent sovereignties, it would have remained in them, notwithstanding the grant, if, by a separate clause, it had not been expressly prohibited to them.

This express prohibition against the coinage of money by the States, which follows the grant of the power in the constitution, affords a cogent argument against any implied prohibition of jurisdiction over offences against the coin. The prohibition was not left to inference, but was expressly stated. It is, therefore, a legitimate argument against a like prohibition of the criminal jurisdiction, that it is not also expressed.

There are undoubtedly powers granted in the constitution which are necessarily exclusive, though not expressly prohibited to the States. The power to establish uniform rules for naturalization, to regulate the value of foreign coin, to fix the standard of weights and measures,—all these are necessarily exclusive; for there could be no regulation, uniformity, or fixed standard, if each State were allowed to legislate upon these subjects.

\*In respect of such powers as are not necessarily exclusive, but which it was deemed expedient to withdraw altogether from State jurisdiction, it will be found that an express and cautious prohibition accompanies the grant. This is so as to the power to lay duties, to coin money, to enter into treaties, to declare war, to emit bills of credit, and to maintain armies or navies in time of peace. It can be said of nearly all those powers, with infinitely more force than as to the mere power of criminal jurisdiction now in question, that they are essentially of a national character, and that the exclusion of State authority might have been left to inference. Why, then, if a prohibition of criminal jurisdiction was intended, was it not also expressed? Why expressly prohibit, with respect to powers of such a character, and omit the prohibition as to a power much less obvious to a prohibition by implication?

In the absence, then, of exclusive grant and express prohi-

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bition, the plaintiff in error has no ground to stand upon, unless she makes out a case of repugnancy or incompatibility.

I think it is quite evident that, if this power is lost to the States on this doctrine of incompatibility, the loss is altogether fortuitous, and not the result of intention; and that, consequently, such a loss ought not to obtain, except from the most controlling necessity. Indeed, that is true of all the exclusive powers claimed for the federal government on this ground.

The true doctrine is found in the thirty-second number of the Federalist, and is stated as follows:—

“An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to Congress. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases; where the constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another, which might appear to resemble it, but which would, in fact, be essentially different; I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction, or repugnancy, in point of constitutional authority.”

It very clearly appears, from this exposition of the powers \*419] of the \*general government and of the States, that there may be an exercise of concurrent jurisdiction in the case of a granted power; that the mere grant works no exclusion of State sovereignty, even where its concurrent exercise may lead to occasional interference in the policy of either government, and that nothing short of absolute and total repugnancy and contradiction will suffice.

And now what is there in the exercise of this criminal jurisdiction by the States, which makes it so absolutely repugnant to the exercise of the same jurisdiction by the general gov-

ernment? I have heard nothing urged which amounts to more than an argument of expediency or convenience, or that shows any thing beyond a liability to "occasional interference."

And, in truth, these arguments from inconvenience are more fanciful than real; for the experience of forty years, during which there has been a concurrent exercise of this jurisdiction, has not furnished a solitary instance of collision or practical inconvenience.

It is said the criminal may be subjected to a double prosecution by this concurrent jurisdiction, and that the conviction or acquittal in one tribunal will not bar a prosecution in the other. This admits of serious question. The doctrine of criminal proceedings and sentences, between governments that are essentially foreign to, and independent of, each other cannot apply, in full force, between the United States and one of the States, in respect of an offence committed within the limits of one of the States, and which is prohibited as well by the laws of the Union and of the particular State.

It is said by Mr. Justice Washington, in *Houston v. Moore*, 5 Wheat., 31, that, in cases of concurrent criminal jurisdiction between the general government and the States, the sentence of either court may be pleaded in bar in the other, in like manner as the judgment in a civil suit. Crimes have reference to place, and are necessarily confined to territorial limits. It follows from this that a crime committed in one State cannot be cognizable in another, either for the purposes of trial and punishment, and that the result of the prosecution, either of acquittal or conviction, is necessarily confined to the territorial limits of the State. It has even been held that a conviction for an infamous offence in one of the States, which works a personal disqualification in the State where the conviction is had, is of no force in another State. *Commonwealth v. Green*, 17 Mass., 515.

The doctrine, it seems to me, does not apply to an offence committed in the body of a State, which is at the same time an infraction of federal and State law. It is not as to either, in regard to territorial limits, a foreign offence, except when committed in some fort, arsenal, dock-yard, or other place lying within any State over which the sole jurisdiction has been surrendered by the State to the general government. Such places no longer belong to the States, \*and are as [\*420 essentially foreign to them, for all purposes of local jurisdiction, as if they were situate in another State.

The objection founded on the power of pardon vested in the two executives is also made to the concurrent jurisdic-

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tion. It is said, by the exercise of this power either government may obstruct the due administration of the criminal laws of the other. This is not to be intended, even if it should be granted that a pardon by either would expiate the offence against both. Arguments founded on a supposed abuse of power are most unsatisfactory. In point of fact, no such abuse has yet arisen, nor is it likely to arise; for both governments are deeply concerned in the prevention of this sort of crime, and the State much more than the federal government.

But if it were admitted that the concurrent jurisdiction involved a liability to a double prosecution, or that there was probability of interference by the exercise of the pardoning power, these results would not divest the States of this portion of their sovereignty. We must look for that in the constitution,—in the terms of the grant; and if the surrender is not found there, it is not to be taken from the States, merely on the ground of occasional interference or collision.

The double prosecution never can extend to cases of life and limb, for that is forbidden, as well to the States as to the general government, by the fifth article of the amendments to the constitution. There is no constitutional difficulty in the way of a double prosecution, involving merely imprisonment or fine, or any other punishment short of life or limb. Indeed, there are many cases of admitted concurrent jurisdiction which lead to this result. Such is the case of a soldier of the United States who commits a crime in the body of a State, and not within a place over which the United States possess exclusive jurisdiction. He is unquestionably liable to prosecution and punishment, as well in the State courts as before a court-martial of the United States. So, too, the same offence may be punished by impeachment by the United States, and prosecution in the local criminal tribunals.

Indeed, in the ordinary administration of criminal law by the respective States, it may happen that what at the common law is considered, and is in fact, but one offence, may be punished in two States. This is so in respect of goods stolen in one State and carried into another. Very many of the States take jurisdiction of the offence, by reason of the mere asportation of the goods into their territory, and not one of them allows the plea of acquittal or conviction of the larceny in the State where the theft was committed, except, perhaps, the State of New York.

It is not pretended, on the part of the plaintiff in error, that there has been any decision of the question at bar by

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this court. Reliance is had upon a solitary decision by the Supreme Court of one of the States, in which State jurisdiction has been denied. This is the case of *Mattison v. Missouri*, 3 Mo., 421.

\*That case, instead of establishing a rule, stands as a remarkable exception to the universal practice of the courts of all the other States. If it were necessary to say more, it might be added, that the force of its authority is weakened by a strong dissenting opinion of one of the judges, and that it does not appear to have been followed, or at all relied upon, in a subsequent case before the same court. *State v. Shoemaker*, 7 Mo., 177. [\*421]

In most of the States, this branch of concurrent jurisdiction has constantly been exercised without question, and in those States in which it has been drawn into question the decisions have fully sustained the jurisdiction. *State v. Antonio*, 3 Wheel. C. C., 508; *State v. Tutt*, 2 Bail. (S. C.), 44; *Chess v. State*, 1 Blackf. (Ind.), 198; *White v. Commonwealth*, 4 Binn. (Pa.), 418.

Another argument in favor of concurrent criminal jurisdiction is found in the fact, that in every general law passed by Congress on the subject of crimes, this power in the States has been recognized by a provision very similar to that contained in the twenty-sixth section of the act now in force. That section is in these words:—"That nothing in this act contained shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by this act." 4 Stat. at L., 121.

I admit that Congress cannot confer jurisdiction upon the State courts, and that this provision could not give the power if it be surrendered in the constitution. It is not in that view that this section helps out the state jurisdiction, but merely as a long-continued exposition of the opinion of Congress that such jurisdiction exists, and has not been surrendered.

Furthermore, this section quite overcomes any argument to be derived from the eleventh section of the Judiciary Act, which provides, that the Circuit Courts of the United States shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act, or the laws of the United States, shall otherwise provide. 1 Stat. at L., 78.

It is claimed for the plaintiff in error, that this provision in favor of State jurisdiction ought to be limited to a jurisdiction under the laws of the States in force at the time of its enactment; and as the law of Ohio, under which this

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prosecution was had, has been enacted subsequently, it cannot be helped by the provision.

The case of the *United States v. Paul*, 6 Pet., 141, is relied upon as establishing this distinction.

That case was a prosecution in the Circuit Court of the United States, for an offence committed at West Point, a place within the exclusive jurisdiction of the United States. No question of concurrent jurisdiction could arise, for in such places the jurisdiction of the United States is exclusive. The \*422] prosecution was for an \*offence not defined in the criminal code of the United States, and was had under the provisions of the third section of the act of Congress of March 3, 1825, which provides, that all crimes committed in places within the exclusive jurisdiction of the United States, which crimes are not defined by any law of the United States, shall be punished in the same manner in which such crimes are punished by the laws of the particular State. The offence was one not made punishable by the laws of New York when the act of 1825 was passed, and the only question was, whether the jurisdiction of the United States should be limited to such offences as were then defined by the State legislation. This court held, that the jurisdiction should be so limited.

The distinction between the question there made and the one at bar is obvious. The third section of the act of 1825 adopted the entire criminal code of the States, as to all crimes other than those specifically enumerated in the body of the act. This was a code of criminal law for the regulation of all persons within the places under the exclusive jurisdiction of the United States, and it was precisely equivalent to an enactment by Congress of every offence then constituting the criminal codes of the States. No laws or offences were adopted into this code of the United States but those then in existence. To bring a subsequent State law or a new offence into this code would require a further adoption, or a new enactment by Congress. It could not otherwise be made the law for the exclusive place, for it would work the greatest injustice to persons within such place to make them liable to new offences, created by a foreign jurisdiction, not in any way provided for or established by the laws under which they lived.

Now, with regard to the provision for concurrent jurisdiction by State courts, under the twenty-sixth section, there is no reason for a limitation to such laws as were in force at the time of the passage of the act. The subsequent laws could only operate upon persons within the jurisdiction in which they were enacted, and bound in every sense to obey them.



The plaintiff in error also relies upon the case of *Prig v. Pennsylvania*, 16 Pet., 539. The doctrine declared in that case is, that, as to fugitives from labor, the jurisdiction of the United States is exclusive, and that no State can exercise any jurisdiction even favorable to the right secured by the constitution.

There is perhaps nothing in the clause of the constitution upon that subject which amounts to an express exclusion of State jurisdiction, and yet the peculiar nature of the subject leads to that result. The reclamation of fugitives is essentially a national subject, and matter of international law and treaty stipulations between independent sovereignties. It was therefore proper to provide for it in our constitution, and the provision is so made as to execute itself without the aid of any legislation. Besides, this provision is not so [\*423 \*much in the character of a grant, or surrender of power, as of a compromise or treaty between the States, securing to a portion of the States an important and delicate right against all subsequent interference. In this compromise the federal government is alone vested with all jurisdiction over the subject, and neither of the States can, by the exercise of any jurisdiction or power, change or impair the right so secured. It is wholly withdrawn from State sovereignty.

I have now considered the arguments for the plaintiff in error against the exercise of concurrent jurisdiction. They have been shown to be all founded in supposed inconvenience. In conclusion, I must ask the attention of the court to some of the consequences which must follow a denial of this jurisdiction.

The criminal code of the United States is made up of a few sections, and defines but a few offences. Except in places under the exclusive jurisdiction of the United States, it has a very limited operation; and as to such places, it adopts for their government the criminal code of the particular State in which they happen to be situate. It establishes no rules for criminal procedure, other than by some general adoption of the State laws and practice. There is no local magistracy in the several States appointed to take the initiative in prosecutions; and the courts of the United States, sitting in one place, and at long intervals, are badly accommodated to the administration of criminal law. Besides all this, the federal government does not possess a jail or penitentiary out of the District of Columbia or its Territories.

Now, to say nothing of other crimes, if it be held that the offence of counterfeiting includes the long list of crimes which

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have relation to spurious coin, and that jurisdiction over all of them is wholly withdrawn from the States, any one can see that the consequences must be most disastrous. There is not a class of crime so common, nor a class of offenders so dexterous, and requiring so much a local vigilance. What speed could be made by the marshal of such a State as Ohio, and his deputy, the only executive officers in that State bound to act in arresting and bringing to justice these offenders, carrying on their business in the eighty counties of the State? If it be said that the State magistrates, sheriffs, and constables may act,—a matter by the way of grave doubt, especially as to judicial action,—yet no one pretends that they are bound to act; you relieve them from the obligation to act under State law the instant you oust the State jurisdiction.

And what is to be done with this class of criminals now convicted in State courts, and undergoing their punishment in the penitentiaries of the States? If this branch of jurisdiction does not belong to the States, their sentences are nullities, and all these felons must be released.

These are some of the arguments from inconvenience, from \*424] a \*denial of this salutary jurisdiction to the States; and they far outweigh all like arguments which have been urged for the plaintiff in error.

*Mr. Convers*, in reply, for the plaintiff in error.

The whole subject-matter of the coin—its creation, regulation, its protection—is vested exclusively in the federal government (Constitution of U. S., art. 1, §§ 8, 20). That the right to coin money is exclusively in Congress is conceded; for not only is the power to coin expressly granted by the constitution, but the exercise of the coining power by the States is expressly prohibited.

This exclusive power of creation would, of itself, upon all sound principles of construction, carry with it the right of regulating and of protecting the thing when created, even in the absence of express grant to regulate and protect. But as the right of coinage is one of the highest attributes of sovereignty, the constitution, for the purpose of shutting out all controversy between the federal and State governments touching so delicate and important a power, proceeds, not from the necessity of the thing, but *ex abundanti cautela*, to prohibit coining by the States,—preferring that the exclusive right of the federal government to this great prerogative power should not rest upon construction alone, however clear and necessary might be the implication in favor of its exclusive claim. The

prohibition against the exercise of this power by the States was therefore inserted in the constitution.

So with respect to the right to punish an injury to the coin of the United States,—the right to preserve it and make it subserve the great purpose of its creation,—this is a necessary incident to the power to create, and as the chief power is exclusive, so is this power to preserve the coin and make it available also exclusive; for the incident follows and partakes of the character of its principal. Notwithstanding this incidental power thus results, by necessary implication, as an exclusive power, it was prudent not to leave it to construction, clear as that is; but, in a matter of which the people were so jealous as of the exercise of criminal jurisdiction by the federal government, to declare in express terms the right to punish.

The legislative power over the subject being exclusive, it follows that the judicial power of the United States over the same thing is also exclusive. In all governments, the judicial is coextensive with the legislative power. They are coexistent and coessential elements of government. The courts of the States, therefore, have no jurisdiction over offences against the coin.

The constitution declares that the judicial power shall extend to “all cases arising under the constitution, laws, and treaties of the United States.” This is a grant of exclusive jurisdiction. It extends to all cases arising under the laws of the United States. It is clearly exclusive; for the constitution, after declaring that the judicial power shall extend to “all cases” of certain descriptions, and proceeding to provide for other cases, in which it is admitted the jurisdiction is concurrent, drops, *ex industria*, the word “all,” and declares that it shall extend to “controversies between citizens of different States,” &c.; thus leaving, in the cases last enumerated, concurrent jurisdiction with the States. The distinction upon which the constitution proceeds in this respect is a clear and intelligible one. Where the federal jurisdiction is made to depend upon the subject-matter, the constitution extends it to “all cases” growing out of such subject-matter, and makes it exclusive. Where it depends, not upon the subject-matter, but upon the character of the parties, it is simply declared to extend to “controversies” between certain parties, not to “all cases” or to “all controversies” between them, and the jurisdiction is not exclusive, but concurrent with a like jurisdiction in the State tribunals.

Now, it has repeatedly been decided that the State courts

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cannot take jurisdiction of a prosecution for an offence against an act of Congress, or for the recovery of a penalty for the violation of any of the penal laws of the United States. *Commonwealth v. Feely*, 1 Va. Cas., 321; *Jackson v. Rose*, 2 Id., 34; *United States v. Lathrop*, 17 Johns. (N. Y.), 4; *Haney v. Sharp*, 1 Dana (Ky.), 442; *Eli v. Peck*, 7 Conn., 244; *Davison v. Champlin*, Id.; *State v. McBride*, 1 Rice (S. C.), 400; *Mathison v. Missouri*, 4 Mo., 421. From these authorities it follows, that Congress has no right to confer judicial power, touching its own proper legislation, upon State tribunals. They are not "ordained and established by Congress." Their judges are not amenable to Congress. They hold, in many of the States, by a different tenure of office from that declared by the federal constitution. The judicial power of the United States is declared to extend to all cases arising under the laws of the United States, and is expressly vested in the Supreme Court and such other tribunals as Congress may ordain and establish (art. 3, § 1).

It is true, that, in some of the cases just cited, it is said that the State tribunals, although not bound to take the jurisdiction tendered by Congress, yet may, if they see proper to do so, assume it. This cannot be. The question is one of power under the constitution, not of discretion.

Now, under the constitution, Congress has or has not the power to transfer jurisdiction to the courts of the States. If it have the power, then it is the duty of the States to receive and exercise the jurisdiction; for, in the peculiar relations subsisting between the general and State governments, the right on the part of Congress to transfer jurisdiction implies the corresponding duty on the part of the States to receive it. Right and duty, used in reference to the general and State \*426] governments, are correlative terms. If \*it be not the duty of the States to take upon themselves the jurisdiction, when directed so to do by Congress, it is not the right of Congress to confer it.

This view of the subject accords with the contemporaneous construction of the constitution afforded by the eleventh section of the Judiciary Act of 1790 (1 Stat. at L., 78), which provides that "the Circuit Courts of the United States shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act or the laws of the United States shall otherwise provide." The latter part of this provision has reference to the cases as to which that act or the laws of the United States may provide that some other court of the United States (not State court) shall have cognizance, instead of the Circuit

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Court. It countenances no such thing as giving to the State tribunals cognizance of these crimes and offences.

The twenty-sixth section of the Crimes Act of March 3d, 1825 (4 Stat. at L., 122), relied upon by the defendant in error, is only a saving of jurisdiction to the States, under the laws thereof, over offences made punishable by that act. It does not profess to confer jurisdiction, but only to leave with the States any jurisdiction which, under their laws, they might rightfully have. That act assumed to exercise over the offences therein declared all the jurisdiction rightfully belonging to the United States, under the constitution and by the twenty-sixth section, to guard against encroaching upon the rights of the States.

But if this section of the act of 1825 did expressly provide that jurisdiction should be vested in State courts over offences made cognizable by that act, it would clearly be void; for, as already shown, Congress has no power to delegate judicial power to the State courts. If it be intended to authorize the State legislatures to make laws to be enforced in their own courts for the punishment of the same offences punishable by that act, Congress transcended its powers in thus attempting to assign to the States the power of legislation, which, by the constitution, is vested in Congress itself. The legislative power of Congress is not an assignable commodity. The federal government is not an original, but derivative government of delegated and limited, not original, powers. Its powers, both legislative and judicial, are vested in itself, to be exercised by itself,—not to be transferred to others,—*delegatus non est delegare*.

Whether, then, the saving in the 26th section of the act of 1825 were intended to apply only to the exercise of judicial power by the State court over the particular “offences made punishable by that act,” where the laws of the States required their courts to take cognizance of offences against the laws of the United States, in cases where Congress so directs, or, what would be more objectionable, to authorize the States to legislate for the punishment of the identical offences made punishable by the act of Congress, and to enforce [\*427 such laws in the State forum, it is in either case alike unconstitutional and void.

But it is said, that, admitting that the power to punish the offence of counterfeiting is an exclusive power, being expressly granted to the United States, yet that the power to punish the passing of counterfeit coin does not belong to Congress, or if it possess such power at all, it holds it concurrently with the States. In support of this, it is urged

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that whilst the constitution expressly invests Congress with power to punish the offence of counterfeiting, it is silent as to the right to punish the uttering of false coin.

Indeed, the argument of the counsel for the defendant in error goes to the extent of denying to the general government the right to punish at all the offence of passing counterfeit money. But the argument cannot be sustained. The power to punish the offence of uttering is essential to enable Congress to protect its coinage, and to make it available. The circulation of the base interferes with that of the genuine coin. It discredits it by casting suspicion upon it. The law of self-protection gives to Congress the right to provide against the uttering and passing of the counterfeit.

It is said, however, that technically there is a distinction between the crime of counterfeiting and uttering. That the former is of higher grade; that in England it is denounced as high treason, while the latter is regarded as a misdemeanour. But this was not so at common law. It is only in virtue of certain acts of Parliament, expressly declaring that counterfeiting should be regarded as treason against the crown, and punished as such,—leaving the kindred crimes of uttering, as all offences against the coin originally were, misdemeanours only. Blackstone, in his Commentaries (vol. 4, pp. 88, 89), says, that there is no foundation in reason for the distinction created by the British statutes.

From the fact, that, at the time of the adoption of the constitution, this distinction obtained in England, although only in virtue of statutes of that realm, and with no reason to justify it, the counsel for the defendant in error claims that the power given to Congress to punish "counterfeiting" must be taken as restricted to that which was declared high treason in England, and does not extend, therefore, to any of the offences which grow out of counterfeiting, and are necessarily incident to it.

This argument cannot be sustained. The reasoning by which it is attempted to support it is too artificial to be applied to such an instrument as the constitution,—the organic law of a great nation,—which deals only in generals, and cannot, from its nature, be expected to descend into details. The constitution having granted the power to punish the crime in chief, gives, as incidental to that, the right to punish all other crimes of like nature, growing out of the principal offence, and which are its necessary concomitants:—especially where, as in this instance, the grant is of power  
 \*428] to punish \*the higher grade of the like offence, for the greater power includes the less.

The term "counterfeiting," as used in the constitution, is *nomen generalissimum*,—the generic term for crimes debasing or impairing the coin. The passing of the spurious is an immediate and direct injury to the genuine coin, for it displaces it in the circulation, and discredits it by exciting distrust and suspicion. Indeed, it is only by the passing of the base that the genuine is injured. To what end is it, that the counterfeiting is prohibited and punished, but to prevent the counterfeit from getting into circulation,—to prevent its passing? The sole object of punishing the act of counterfeiting is to prevent the circulation and passing of the counterfeit, to the prejudice of the genuine.

The argument of the counsel for the defendant in error, while it concedes the power to punish the act of counterfeiting, in order to prevent the consequence which flows from it,—the passing and circulation of counterfeit coin,—would yet deny the power to punish for bringing about that very consequence itself,—the passing; for doing the very thing to prevent which the act of counterfeiting is itself made punishable.

However apposite the argument might be, on a question of criminal special pleading, which deals in technical refinement, it is wholly out of place when applied to constitutional construction.

Again; the ground upon which it is claimed that the States have power to punish offences against the coin of the United States is, that the powers belonging to the States prior to the adoption of the constitution are retained by them, unless prohibited by the constitution in express terms, or by necessary implication.

Now, if it were conceded that the exclusive right of punishing the passing of base coin was not vested in Congress by express grant, it would not follow that the States possessed that power,—because the States never, at any time, had the power of punishing offences against the coinage of the United States. They had no such original power before the constitution, because no such coinage was then in existence. They then had the power to punish counterfeiting of their own State coin, and of foreign coin. But the coin of the United States is not the coin of a State, but of the federal government. It is not a foreign coin; for in regard to the federal coin, the States are not foreign to each other, or to the United States,—all deriving their coin from the same source, the federal government.

A coin so peculiar in the relation which the States sustain to it as that of the United States coin was wholly unknown to

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the original States. It is a new thing,—a creation of the constitution itself. It cannot, therefore, be said that the States, before the adoption of the constitution, were ever possessed of the right to punish offences against the federal coin, or destructive of its end, \*and that such power, not being \*429] taken away from the States by the constitution, remains to them, to be exercised as part of their original proper powers. This view of the question seems conclusive in favor of the exclusive power of the United States over the protection and preservation of its coin, including the derivative and secondary offence of passing, as well as the offence in chief of counterfeiting. Finally, it is claimed on behalf of the defendant in error, that if the United States possess the power to punish the uttering, it is only concurrent with a like power belonging to the States.

What has been already said shows, I think, conclusively, that the power of Congress to punish the crime of counterfeiting is exclusive; and as the power to punish the passing is derived from the same source, being necessarily incidental, that also is exclusive. The same reasoning that supports the claim of one to an exclusive character supports that of the other to a like exclusive character.

The difficulties and collisions which result from the concurrent exercise of power in either case are precisely the same. A slight consideration of the consequences which result from regarding the power to punish either the counterfeiting or the passing as concurrently vested in the federal and State governments, will conclusively show that no such concurrent power can exist.

Now, if the power be concurrent, a conviction in the State court is, on the one hand, a bar to a prosecution in the federal court, and *e converso*, a conviction in the federal court is a bar to a prosecution in the State court; or, on the other hand, such conviction in one court is not a bar to a prosecution in the other. The weight of authority is decidedly in favor of the doctrine, that a conviction in either court is a bar to a prosecution in the other. It has been repeatedly held that a man cannot be convicted and punished for two distinct felonies growing out of the same identical act, and that a former conviction or acquittal of an offence of one denomination is a bar to another prosecution for an offence of another and different denomination, founded upon the same act. 1 Green (N. J.), 362; 2 Hayw. (N. C.), 4; 2 Hawks (N. C.), 98; 2 Tyler (Vt.), 387; 2 Va. Cas., 189; 7 Conn., 54.

In regard to concurrent jurisdiction, it is also a universal



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principle, wherever the common law is known, that, of the concurrent courts, the one which first takes jurisdiction acquires by that act the right to go on and exercise the jurisdiction throughout, to the exclusion of all other concurrent tribunals. The right to jurisdiction is concurrent; but when the exercise of the right once begins in any one of the concurrent courts, so that jurisdiction attaches to the particular case, the case then becomes one exclusively cognizable by that court, and the other tribunals cannot interfere. 16 Mass., 171; Id., 203; 3 Yerg. (Tenn.), 167; 2 Stew. & P. (Ala.), 9; 1 Hawks (N. C.), 78; Paine, 621.

\*In *Antonio's case*, 3 Wheel. C. C., 508 (and also [\*430 reported in 2 (N. Y.), 781), so strongly relied upon by the defendant in error to show the concurrent power of the State, it is said that a conviction in the State is a bar to a prosecution for the same act in the federal court. The same thing is said by Mr. Justice Washington, in *Huston v. Moore*, 5 Wheat., 31.

Now, if a prosecution in a State court is to be sustained under the twenty-sixth section of the act of Congress of 1825, it follows that Congress has the power to divest the courts of the United States of their jurisdiction over acts declared offences and made punishable by act of Congress, notwithstanding the constitution expressly declares that the judicial power in "all cases arising under the constitution, laws, and treaties of the United States" shall be vested in the courts of the United States. And Congress in the twentieth section of that act has expressly provided for punishing the crime of passing and uttering counterfeit coin,—the very crime of which the plaintiff in error was convicted in the State court. And not only so, but, if the conviction in the case now before the court be sustained, being a conviction under a statute of Ohio, passed in 1835, providing for the punishment of the same crime, Congress also parts with its proper power of legislation and transfers that to the legislatures of the States,—transfers a power given to Congress to be exercised by itself alone for the benefit of the people of the whole Union, and not to be delegated to other legislative bodies.

The principle that a State conviction is a bar to a federal prosecution, and that, where there is concurrent jurisdiction, the tribunal first taking jurisdiction afterwards holds that jurisdiction, and exercises it throughout, to the exclusion of all others, necessarily leads to this result. Both the legislative and judicial powers of the United States are thus rendered abortive. The States, by the agency of Congress

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(whether the language of the act of Congress authorizing it be in terms imperative or permissive), are made to defeat the powers granted by the constitution to the general government.

But the evil does not stop here. The jurisdiction of the States, when a prosecution is once begun in their tribunals, is exclusive, as well to discharge the convict from punishment, as for inflicting it; and the pardoning power, in such case, becomes exclusively vested in the executive of the State. The President, then, has no right to pardon, or to refuse to pardon, although the offence consists of an act made punishable by Congress. The pardoning power vested in him by the constitution is by the action of the State governments, by the direction or with the consent of Congress, invaded. Congress has placed a case which properly belongs to him, under the constitution of the United States, beyond his reach.

Thus, upon this construction, not only are the functions \*431] of the \*legislative and judicial departments of the federal government taken from them, and vested in the States, but the President of the United States is stripped of his prerogative of executive clemency. Surely a doctrine leading to such results cannot be sustained; and there is no escape from it but to hold that a conviction in a State court is no bar to a prosecution in the courts of the United States. For, if the concurrent jurisdiction of the State courts do not become exclusive, upon a prosecution being commenced and carried on to conviction and punishment, it follows that neither a prosecution nor conviction in a State court can be a bar to a prosecution under the act of Congress in the federal courts; and that a person may be thus twice put in jeopardy, and twice punished, for the same offence, contrary to the fifth article of the amendments to the constitution of the United States, which declares that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."

If Congress merely permit the States to punish the offence, when it might prevent it, and afterwards punish the same act itself, it violates both the letter and spirit of this great safeguard of the citizen,—one which is also a fundamental principle of the common law. It has already pervaded its criminal jurisprudence. Indeed, even in civil cases the common law declares *nemo bis vexare pro eadem causa*.

The constitution of Ohio contains a like prohibition against a double prosecution and double punishment; and yet, if the doctrine of the defendant in error be sustained, the plain-

tiff in error is liable, notwithstanding this double guarantee, to be twice prosecuted, twice convicted, and twice punished, for the same offence. These great constitutional provisions become a mere mockery. There is no escape from the alternative presented, between divesting the judicial, legislative, and executive departments of the federal government of their constitutional powers, and the double jeopardy and punishment, except to hold that the cognizance of the offence is exclusively vested in the general government.

It is suggested by the counsel for the defendant in error that the protection against the double jeopardy does not apply to this case, where the punishment is imprisonment only, the language of the fifth article of the amendment to the constitution being "twice put in jeopardy of life or limb." He seems to think that it must be a case of actual, total loss or destruction of limb, to come within the constitutional protection. This is clearly a mistake. That it extends to cases where the punishment was total loss or destruction of limb is true, although there were but very few cases of such punishment known to the common law at any time, even in its earliest and most barbarous periods; and I believe none at all when the constitution was adopted. But the jeopardy of limb was not confined to cases of actual dismemberment. It is a common law \*term, and extends to all cases [\*482 where punishment inflicted any injury upon limb, and of course to confinement or restraint of the freedom of limb, whether it be by imprisonment in the stocks, the dungeon, or the penitentiary, as well as to cases of actual dismemberment.

In conclusion I ask, what reason is there for vesting a concurrent jurisdiction in State tribunals? The federal government has no need of such aid. In its own ample resources, in the plenitude of its own proper powers, lie the means of its safety and protection. *Hic arma, hic currus*. To hold that the States have concurrent power will lead to jealousies and contentions between the two jurisdictions. It cannot be expected that this *divisum imperium*, this "joint occupation" of the same ground by the federal and State governments, can go on without engendering strifes and collisions.

In view, then, of the difficulties that result from the doctrine of concurrent right in the States, as well as of the clear grant to the federal government of the whole subject-matter of the coin, I submit whether the attempt to make out the concurrent right does not fail, and ask, therefore, a reversal of the judgment.

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Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of the State of Ohio, by whose judgment was affirmed the judgment of the Court of Common Pleas for the county of Morgan in that State, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her for that offence to imprisonment and labor in the State penitentiary for three years.

The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7th, 1835, and the particular clause on which the indictment was founded is in the following language, viz.:—"That if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or *put off* counterfeit coin or coins, knowing them to be such," &c., "every person so offending shall be deemed guilty of a misdemeanour, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than fifteen nor less than three years." As has been already stated, the plaintiff was convicted of the offence described in the statute, her sentence was affirmed by the Supreme Court of the State, and, with the view of testing the validity of the sentence, a writ of error to the latter court has been issued.

With the exceptions taken to the formality or technical accuracy of the pleadings pending the prosecution, this court can have nothing to do. The only question with which it can regularly deal in this case is the following, viz.:—Whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and, consequently, whether the conviction and sentence founded \*433] on the statute, are consistent with or in contravention of the constitution of the United States, or of any law of the United States enacted in pursuance of the constitution? For the plaintiff, it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the eighth section of the first article of the constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offences which may be denominatd offences against the coin itself, such as counterfeiting, scaling, or clipping it, or debasing it in any mode, but that they embrace other offences, such as frauds, cheats, or impositions between man and man by intentionally circu-

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lating or putting upon any person a base or simulated coin. On behalf of the State of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the constitution in question, either by a natural and philological interpretation of their language, or by any real necessity for the attainment of their objects; and that if any act of Congress should be construed as asserting this meaning in the constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the constitution, nor one deriving its authority regularly from that instrument.

We think it manifest that the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing: it leaves the legal coin as it was,—affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offences, but essentially also in their characters. The former is an offence directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree, be reached. A material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the *counterfeiting* of the coin is made high treason, whether it be uttered or not; but those who barely *utter* false money are neither guilty of treason nor of misprision of treason.<sup>1</sup> 1 Hawk. P. C., 20. Again (1 East, Crown Law, 178), if A. counterfeit the gold or silver coin, and by agreement before such counterfeiting B. is to receive and vent the [\*434] money, he is an aider and abettor to the \*act itself of counterfeiting, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanour, &c. These citations from approved English

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<sup>1</sup> CITED. *United States v. Coppersmith*, 2 Flipp., 557.

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treatises on criminal law are adduced to show, in addition to the obvious meaning of the words of the constitution, what has been the adjudged and established import of the phrase *counterfeiting the coin*, and to what description of acts that phrase is restricted.

It would follow from these views, that if within the power conferred by the clauses of the constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the federal and State authorities, operating each upon these distinct characters of offence. If any such conflict can be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary State power. The punishment of a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable. It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offence of passing base coin, and the federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the constitution, declaring that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of *Barron v. The Mayor and City Council of Baltimore*, 7 Pet.,

248; and such indeed is the only rational and \*intelligible interpretation which those amendments [\*435 can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority,—restrictions which some of the States regarded as the *sin qua non* of its adoption by them. It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offence described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the State. So far, then, neither the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the constitution of any law of the United States made in pursuance thereof. The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things affirmed.

Mr. Justice McLEAN.

I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.

The defendant in the State court was indicted and convicted of passing “a certain piece of false, base, counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar.” This is made an offence by the law of Ohio, and punished by imprisonment in the penitentiary, and being kept at hard labor, not more than fifteen, nor less than three years. The defendant was sentenced to imprisonment at hard labor for three years.

The act of Congress of the 3d of March, 1825, punishes the same offence, “by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years.”

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The eighth article of the constitution gives power to Congress "to coin money, regulate the value thereof, and of foreign coin." Also, "to provide for the punishment of counterfeiting the securities and current coin of the United States."

Jurisdiction is taken in this case, on the ground that the \*486] law under which the defendant in the State court was sentenced is repugnant \*to the constitution of the United States, and the above-cited act of Congress.

Objection is made to the sufficiency of the description of the counterfeit coin alleged to have been passed. But I think the indictment, although not technical in this averment, is maintainable. The false coin is alleged to be of the similitude "of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." The words "legal," "currently passing," and "dollar," are significant, and must be held to be the coin made legal and current by act of Congress, and that the denomination of a dollar, so connected, is a coin legal and current.

The power to "coin money, regulate the value thereof and of foreign coin," vested by the constitution in the federal government, is an exclusive power. It is expressly inhibited to the States. And the power to punish for counterfeiting the coin is also expressly vested in Congress. This power is not inhibited to the States in terms, but this may be inferred from the nature of the power. Two governments acting independently of each other cannot exercise the same power for the same object. It would be a contradiction in terms to say, for instance, that the federal government may coin money and regulate its value, and that the same thing may be done by the State governments. Two governments might act on these subjects, if uniformity in the coin and its value were not indispensable. There can be no independent action without a freedom of the will, and in this view how can two governments do the same thing, not a similar thing? The coin must be the same and the value the same; the regulation must be the result of the same discretion, and not of distinct and independent judgments. This power, therefore, cannot be exercised by two governments.

The act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States," &c., provides, by the twenty-sixth section, that "nothing in that act shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by that act."



Offences are made punishable in that act committed on the high seas, in navy-yards, and other places where the United States have exclusive jurisdiction, and also for counterfeiting the coin of the United States. Now it must be admitted that Congress cannot cede any portion of that jurisdiction which the constitution has vested in the federal government. And it is equally obvious, that a State cannot punish offences committed on the high seas, or in any place beyond its limits. The above section, therefore, cannot extend to offences without the State, nor to State statutes subsequently enacted. It is a settled rule of construction, that the statutes of a State subsequently enacted must be expressly adopted by Congress. The statute under which the defendant below was [\*437 indicted was passed the 7th of March, 1835, so that no force could be given to it by the act of Congress of 1825.

That Congress have power to provide for the punishment of this offence seems to admit of no doubt. Coin is the creation of the federal government; and the power to punish the counterfeiting of this coin is expressly given in the constitution. And these powers must be incomplete, and in a great degree inoperative, unless Congress can also exercise the power to punish the passing of counterfeit coin. Such a power has been exercised by the federal government for many years, and its constitutionality has never been questioned.

Counterfeiting the notes of the Bank of the United States was made an offence by Congress, and punishments were inflicted under that law. This power was never doubted by any one who believed that Congress had power to establish a national bank. It seemed to be the necessary result of the power to establish the bank. For the principal power was in a great degree a nullity, unless Congress had power to protect that which they had created. I speak not of the power to establish the bank, but of the power which necessarily resulted from the exercise of that power. And if this power to protect the notes of the bank was necessary, the power to protect the coin is still clearer, as there can be no question as to the constitutionality of the act of Congress to establish the coin and punish the act of counterfeiting it. In relation to the bank, the principal power is doubted by many, but in relation to the coinage there can be no doubt. The protection of the coin was at least as necessary as the protection of the notes of the bank. But it cannot be necessary further to illustrate the power of Congress to punish the passing of counterfeit coin. It is a power which seems never to have been doubted.

Under the power "to establish post-offices and post-roads," Congress have provided for punishing violations of the mail,

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regulated the duties of the agents of the post-office department, required, under heavy penalties, ferry-keepers to pass over the mail without delay, &c. These and numerous other regulations are necessary to carry out the principal power. And so in relation to the coins. Is it reasonable to suppose that Congress, having power to coin money, and to punish for counterfeiting the coin, should have no power to punish for passing counterfeit coin? Is this coin created by the federal government, and thrown upon the community, without power to prevent a fraudulent use of it? The powers of the general government were not delegated in this manner. Where a principal power is clearly delegated, it includes all powers necessary to give effect to the principal power. This is not controverted, it is believed, by any one. It would seem, therefore, that the power to punish for passing counterfeit coin is clearly in the federal government.

\*438] Can this same power be exercised by a State. I think it cannot. Formerly Congress provided that the State courts should have jurisdiction of certain offences under their laws, and in several States indictments were prosecuted, and to a limited extent the laws of the Union were enforced by the States. But some States very properly refused to exercise the jurisdiction in such cases, and it was too clear for argument that Congress could not impose such duties on State courts. And this doctrine is now universally established. Consequently no State court will undertake to enforce the criminal law of the Union, except as regards the arrest of persons charged under such law. It is therefore clear, that the same power cannot be exercised by a State court as is exercised by the Courts of the United States, in giving effect to their criminal laws.

In some cases the acts of Congress adopt the laws of the States on particular subjects; but even these, so far as the United States are concerned, become their laws by adoption, as fully as if they had been originated by them, and cannot be considered in any different light than as if they had been so passed.

If a State punish acts which are made penal by an act of Congress, the power cannot be derived from the act of Congress, but from the laws of the State. And in this light must the act of Ohio be considered, under which the defendant below was punished.

The act of Ohio does not prescribe the same punishment for passing counterfeit coin as the act of Congress. This State law must stand upon the power of the State to punish an act over which the law of Congress extends and punishes. The

passage of counterfeit coin is said to be a fraud which the State may punish.

With the same propriety, it is supposed that a State may punish for larceny a person who steals money from the mail or a post-office. And yet a jurisdiction over this offence, it is believed, has not been exercised by a State.

The postmaster or the carrier, as the case may be, has a temporary possession of letters, but the money abstracted from a letter in the mail or in the post-office may be laid in the owner, who, in contemplation of law, retains the right of property until the money shall be received by the person to whom it is forwarded.

Many, if not all, of the States punish for counterfeiting the coin of the United States, while the same offence is punished by act of Congress. And, as before stated, the constitution vests this power expressly in Congress. Now in these two cases, viz. counterfeiting the coin, and passing counterfeit coin, the same act is punished by the federal and State governments. Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such cases, where the federal government has an undoubted jurisdiction, a State government can punish the same act. The point is not \*whether a State may not punish an offence [\*439 under an act of Congress, but whether the State may inflict, by virtue of its own sovereignty, punishment for the same act, as an offence against the State, which the federal government may constitutionally punish.

If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the laws of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offence, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This, it is true, applies to

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the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Mr. Hamilton, in the thirty-second number of *The Federalist*, says there is an exclusive delegation of power by the States to the federal government in three cases:—1. Where in express terms an exclusive authority is granted; 2. Where the power granted is inhibited to the States; and 3. Where the exercise of an authority granted to the Union by a State would be “contradictory and repugnant.”

The power in Congress to punish for counterfeiting the coin, and also for passing it, is exercised under the third head. That a State should punish for doing that which an act of Congress punishes, is contradictory and repugnant. This is clearly the case, whether we regard the nature of the power or the infliction of the punishment. As well might a State punish for treason against the United States, as for the offence of passing counterfeit coin. No government could exist without the power to punish rebellion against its sovereignty. Nor can a government protect the coin which it creates, unless it has power to punish for counterfeiting or passing it. If it has not power to protect the constitutional currency which it establishes, it is the only exception in the exercise of federal powers.

There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the State governments. The federal is a limited government, exercising enumerated \*440] powers; but the powers given are \*supreme and independent. If this were not the case, it could not be called a general government. Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt. The sixth article of the constitution preserves the government from so great a reproach. It declares, that “this constitution, and the laws of the United States made in pursuance thereof, &c., shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.” That the act of Congress which punishes the passing of counterfeit coin is constitutional, would seem to admit of no doubt. And if that act be constitutional, it is the supreme law of the land; and any State law which is repugnant to it is void. As there cannot, in the nature of things, be two punishments for the same act,

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it follows that the power to punish being in the general government, it does not exist in the States. Such a power in a State is repugnant in its existence and in its exercise to the federal power. They cannot both stand.

I stand alone in this view, but I have the satisfaction to know, that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the Supreme Court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented. But at that time, on account of the diversity of opinion among the judges present, and the absence of others, a majority of them being required by a rule of the court, in constitutional questions, to make a decision, a reargument of the cause was ordered. I think the judgment of the State court should be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, in this cause be and the same is hereby in all things affirmed, with costs.

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\*NATHANIEL S. WARING AND PETER DALMAN, [\*441  
OWNERS OF THE STEAMBOAT DE SOTO, HER  
TACKLE, APPAREL, AND FURNITURE, APPELLANTS, v.  
THOMAS CLARKE, LATE MASTER OF THE STEAMBOAT  
LUDA, AND AGENT OF P. T. MARIONOUX AND T. J.  
ABEL, OWNERS OF SAID STEAMBOAT LUDA, HER TACKLE,  
APPAREL, FURNITURE, AND MACHINERY, APPELLEES.

The grant in the constitution, extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union.<sup>1</sup>

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<sup>1</sup> CITED. *The Belfast*, 7 Wall., 636; jurisdiction of the United States  
*Atkins v. Disintegrating Co.*, 18 Id., 304. courts at great length, with much  
Judge Woodbury, in *United States* research. An indictment had been  
v. *The New Bedford Bridge*, 1 Woodb. found by reason of the bridge ob-  
& M., 402, examines the admiralty structing the navigable stream over

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Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty juris-

which it was built; and it was held that it could not be maintained, because there was no United States statute making the maintenance of such a bridge a criminal offence.

In the case of *The Congress*, 1 Biss., 42, it was said that in cases of general average in England, the court of admiralty had no jurisdiction. "That court has been confined in its jurisdiction by the common law courts. Such has not been the case in America." And it was held that the court had jurisdiction of the case, citing *La Constancia*, 2 W. Rob., 487. So the admiralty court has jurisdiction over policies of marine insurance. *Gloucester Ins. Co. v. Younger*, 2 Curt., 322; *Delovio v. Boit*, 2 Gall., 398 (1815); *Peele v. Massachusetts Ins. Co.*, 3 Mason, 27 (1822); *Hale v. Washington Ins. Co.*, 2 Story, 176 (1842); *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6 (1822). So a maritime lien upon a domestic vessel, for wharfage, is enforceable in the admiralty court. *The Canal-boat Kate Tremaine*, 5 Ben., 60. So such courts may pass upon the simple right of possession of a ship. *Taylor v. The Royal Saxon*, 1 Wall. Jr., 311. So of a contract for the transportation of goods on the high seas, within the meaning of the clause in the Constitution which extends the judicial power to "all cases of admiralty and maritime jurisdiction." *The Huntress*, 2 Ware, 89.

In the Constitution, the terms "admiralty" and "maritime" are not synonymous. Each has its appropriate use. These terms belong to the law of nations, as well as to our own domestic law, especially "admiralty." A court of admiralty is a court of the law of nations, and derives, in part, its jurisdiction from that law. The Constitution, therefore, refers to the law of nations for the meaning of these terms, or constituting a part of our law. The object of the framers of the Constitution was to make the judicial co-extensive with the legislative power. The regulation and government of maritime commerce is given to the legislature, and by taking the word maritime, in this clause

of the Constitution, in its usual and natural sense, the judicial power is made co-extensive with that of the legislature. *The Huntress*, 2 Ware, 89; *Fashion v. Warder*, 6 McLean, 162, 182; *Cunningham v. Hall*, 1 Cliff, 43, 52.

The rescuing a raft of timber found adrift in a harbor, and floating out to sea unaccompanied by any person, is in its nature a maritime salvage service, for which salvage compensation may be awarded and enforced in a court of admiralty. *A Raft of Spars*, Abb. Adm., 485.

The act of 9 & 10 Vict., c. 99, § 40, which gives the admiralty jurisdiction in salvage, for services performed, "whether in the case of ships, goods, or other articles found at sea or cast ashore," carries the jurisdiction of the English admiralty no further than its accustomed exercise in the United States. *A Raft of Spars*, Abb. Adm., 483, 488; *The Wave*, 1 Blatchf. & H., 235.

The district court has no jurisdiction of a libel in *personam* against the builder, to recover damages for the non-completion of a ship, according to a written contract under which the ship was built and sold, for defects in the construction, discovered after the ship was sold and employed on a voyage. *Cunningham v. Hall*, 1 Cliff, 43.

Where a material man has a lien on a vessel, under the general maritime law of the United States, he has a right to enforce the lien by a suit in the United States court, although the vessel may have been subsequently seized and sold under a State law concerning boats and vessels. *Asbrook v. Steamer Golden Age*, Newb. Adm., 296; *The Richard Busted*, 1 Sprague, 441.

Under the Judiciary Act of 1789, the courts of the United States have cognizance of all civil cases of admiralty and maritime jurisdiction, exclusive of the State courts, except as to the common-law remedy. That remedy existed before the Constitution and Act of 1789, and is by the latter *saved, not given*. A common-law remedy is a

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diction. The subject-matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision. In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, courts of admiralty of the United States have jurisdiction.<sup>2</sup>

remedy by *action* at common law, and is not a proceeding *in rem* against the vessel. *Ashbrook v. The Steamer Golden Age*, *supra*.

An agreement by the owners for the future employment of their vessels resembles more a consortium than a charter-party, and to it no lien is fixed by implication of law. Maritime liens will not be extended by implication. *Vandewater v. Steamship Yankee Blade*, McAll., 9.

The owner of the vessel may be sued in the United States District Court for torts of the master, when they involve a breach of the passenger contract, and are done while acting strictly within the scope of his employment. *McGuire v. Steamship Golden Gate*, McAll., 104.

Where a tort is a continuous act and not separable, and a portion is committed on land and the remainder on the high seas, the jurisdiction of it attaches to the common-law courts. If the tortious act originated in port, and is not a perfect wrong until the vessel leaves the port, it is a continuous act, and travels with the *tort-feusor* and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle enunciated in certain cases, that if a thing be taken on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a marine tort. *Barque Yankee v. Gallagher*, McAll., 467.

Contracts for building sea-going vessels have been held to be maritime. *The Richard Busteed*, 1 Sprague, 441.

To require a contract, to be maritime, to be made upon the sea, "borders upon absurdity." Lord Kenyon in *Menetone v. Gibbons*, 3 T. R., 269.

The master of a vessel in New York contracted at the port of New York to transport a cargo across the East River to Brooklyn,—a voyage less than a mile in length, but across tide-water,—took part of the cargo on board, but afterwards refused to take on the

residue, or to deliver that already laden. It was held that an action *in rem* would lie both for the refusal to receive on board and the refusal to deliver, notwithstanding that the contract was made in the home port, and for a voyage of so local a character, and notwithstanding that only a portion of the goods were received on board. *The Flash*, Abb. Adm., 67.

The civil jurisdiction of the courts of the United States in maritime causes of contract or tort embraces tide-waters within the bays, inlets of the sea, and harbors along the seacoast of the country, and in navigable rivers; but such courts cannot take cognizance of criminal offences of any grade without the express appointment or direction of positive law. Therefore under the Act of March 26th, 1804 (2 Stat. at L., 290), prescribing punishment for the wilful destruction of a vessel, it is necessary, in order to give to such courts jurisdiction of the offence, that it should be committed upon the high seas, and not merely upon waters within the jurisdiction of the United States. The term "high seas," used in the criminal legislation of the United States, is used in its popular sense, and in contra-distinction to mere tide-waters flowing in ports, harbors, and basins, that are land-locked in their position, and subject to territorial jurisdiction. *United States v. Wilson*, 3 Blatchf., 436.

The admiralty has jurisdiction of a libel by mariners for their wages against a vessel plying on navigable waters, though these waters are entirely within one State. *The Sarah Jane*, 1 Low., 203.

<sup>2</sup> FOLLOWED, as to body of a county, *Philadelphia &c. R. R. Co. v. Philadelphia &c. Steam Towboat Co.*, 23 How., 215; *The Propeller Commerce*, 1 Black, 580; *The Potomac*, 15 Otto, 630. DISAPPROVED, as to ebb and flow of tide, *The Genessee Chief v. Fitzhugh*, 12 How., 468, 464; *Jackson v. Steamboat Magnolia*, 20 Id., 314 (see Id., 322,

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The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away.

The act of 7th July, 1838 (5 Stat. at L., 304), for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, is obligatory in all its provisions, except as it has been altered by the act of 1843 (5 Stat. at L., 626), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State, or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States.

By the law of 7th July, 1838, masters and owners neglecting to comply with its conditions are liable to a penalty of two hundred dollars, to be recovered by suit or indictment. And if neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it.<sup>3</sup>

THIS case was an appeal from the Circuit Court of the United States for East Louisiana.

It was a suit in admiralty, brought originally in the District Court for the Eastern District of Louisiana, by Thomas Clarke, as late master of the steamboat Luda, and as agent for her owners, against the steamboat De Soto and her owners, Waring and Dalman, to obtain compensation for the destruction of the Luda by means of a collision between said boats.

A libel, answer, and supplemental libel and supplemental answer were filed, which were as follows :—

To the Honorable Theodore H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The libel and complaint of Thomas Clarke, late master of the steamboat Luda, of New Orleans (and agent of P. T. Marionoux, of the parish of Iberville, in Louisiana), and of T. J. Abel, of the city of New Orleans, owners of the said \*442] steamboat Luda, her tackle, \*apparel, furniture, and machinery, and who authorize libellant to institute this suit against the steamboat De Soto, her tackle, apparel, and furniture, whereof S. S. Selleck now is, or lately was, master, now in the river Mississippi, in the port of New Orleans, where the tide ebbs and flows, and within the admiralty jurisdiction of this court, and against Nathaniel S. Waring, Peter Dalman, and Parker, all residing within the jurisdic-

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338); *The Hine v. Trevor*, 4 Wall., 563. CITED. *The Eagle*, 8 Wall., 26. And see *Holmes v. Oregon &c. R'y Co.*, 6 Sawy., 266.

<sup>3</sup> CITED. *The Grace Girdler*, 7 Wall., 203. See also *Burning of the Henry Clay*, 2 Edm. (N. Y.) Sel. Cas., 345.



tion of this honorable court, owners of said steamboat De Soto, and also against all persons lawfully intervening for their interest in said steamboat De Soto, in a cause of collision, civil and maritime; and thereupon the said Thomas Clarke, master and agent as aforesaid, alleges and articulately propounds as follows:—

First. That the steamboat Luda, whereof libellant was then master, was, on the first day of November last past, at the port of New Orleans, and destined on a voyage or trip from thence to Bayou Sarah, on the river Mississippi, about one hundred and sixty-five miles from the city of New Orleans, with lading of goods, wares, and merchandise, to the amount of                    in value, or thereabouts, and several passengers, and was at that time a tight, staunch, and well-built vessel, of the burden of two hundred and forty-five [tons]; and was then completely rigged, and sufficiently provided with tackle, apparel, furniture, and machinery; and then had on board, and in her service, twenty-two mariners and fireman, which was a full complement of hands to navigate and run said steamboat Luda on the voyage above mentioned, and all the necessary officers to command said boat.

Second. That on said first day of November, 1843, the said steamer Luda, provided and manned as aforesaid, departed from the said port of New Orleans, being propelled by steam, on her aforesaid voyage to Bayou Sarah; and, in the prosecution of her voyage on the said river Mississippi, arrived at what is called the Bayou Goula bar, in said river, about ninety-five miles from the said port of New Orleans, on or about the hour of two o'clock, A. M., of the morning of the second day of November, 1843, and was running as near to, or closely "hugging" said bar, being on her starboard, as she could safely; whilst the said steamer was running in that position, pursuing the usual track which steamboats ascending the said river take under the circumstances, and going at her usual speed of about ten miles per hour, at the time aforesaid, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, Garrett Jourdan, the pilot of said steamer Luda, who was then at the wheel, and controlled and directed said boat on said voyage, and Levi Babcock, also the pilot of said boat, and who was then on the hurricane-deck of said boat, observed the said steamboat De Soto, whereof the said S. S. Selleck was then master, of the burden of two hundred and fifty tons, or thereabouts, descending said river, being propelled by \*steam, and controlled and directed at the [\*443 time by one James Wingard, pilot of said boat, who

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then had the wheel steering said boat in a direction parallel with, and at a distance from, the course then pursued by the Luda, sufficient to have passed the said Luda without touching; and at a distance of about nine hundred feet or more, and in that position, the said boats continued to run, the Luda ascending, the De Soto descending, the said river as aforesaid, until their bows were nearly opposite to each other, when, notwithstanding there was sufficient room for said boats to have passed each other without collision, and notwithstanding the said Luda was then in her proper position, running as near said bar as she could safely, said James Wingard, the said pilot of the De Soto, suddenly turned the wheel, and threw the De Soto out of her proper position, and changed her course nearly at right angle to the one she [had] been running, in a direction towards the Luda; and notwithstanding the pilot of the said Luda rang her bell, and threw her fire-doors open to apprise the De Soto of the situation of the Luda, the said pilot of the De Soto, either intentionally and wilfully, or most grossly, negligently, and culpably, ran the bow of the De Soto, with great force and violence, foul of and against the Luda, about or near midship on the larboard side, and thereby so broke and damaged the hull and machinery of the Luda, that the said Luda in a few minutes filled with water and sunk to the bottom of said river, in ten or twelve feet water, where she now lies a total wreck, worthless, and an entire loss; and so sudden did she fill with water and sink, that two of the crew, a white man and negro, were drowned, or are missing and cannot be found; the balance of the crew, officers, and passengers barely escaped with their lives, and were not able to save any thing of the freight on board, or any part of said boat, her tackle, apparel, and furniture, &c., or even their clothes, the whole being lost by reason of the said boat De Soto having run foul of and against the said Luda as aforesaid, and sinking said Luda as aforesaid.

Third. That at the time the collision and damage mentioned in the next preceding article happened, it was impossible for the steamer Luda to get out of the way of the said steamer De Soto, by reason that the former was in her proper position, running as near to, or closely "hugging" said bar, as she could prudently and safely; that there was room enough for the said steamboat De Soto to steer clear of, and pass by, the said Luda, without doing any damage whatever, or coming in collision with the Luda; and that if the said James Wingard, the pilot of the said De Soto, had not changed the direction of the said De Soto, but kept her in

her proper position as aforesaid, and had not refused, or at least carelessly and culpably neglected, to endeavour to keep clear of said Luda, which it was his as well as the officers' duty to do, of said De Soto, and which they might with ease and safety have done, the \*aforesaid collision, damage, [\*444 and loss of life and property would not have happened; and libellant expressly alleges that the same did happen by reason of the culpable negligence, incompetency, or wilful intention of the said pilot and officers of the said De Soto.

Fourth. That the said steamboat Luda, before and at the time of being run foul of, damaged, and sunk by the said steamer De Soto, as hereinbefore mentioned, was a tight, strong, and stanch boat, and was, together with her tackle, apparel, and furniture, and machinery, worth the sum of fifteen thousand dollars; and that the books, papers, &c., belonging to said boat, and the property belonging to the officers and crew of said boat (exclusive of goods, wares, and merchandises on board of said boat), belonging to various persons unknown to libellant, as well the value thereof, were reasonably worth the sum of one thousand dollars; all of which was lost as aforesaid, and that by reason of the said steamboat Luda having been run foul of and sunk by the said steamer De Soto, as hereinbefore mentioned. Libellant, as master and agent of the owners of said Luda, has sustained damages to the amount of sixteen thousand dollars, which sum greatly exceeds the value of the said steamer De Soto; and for the payment of which sum the said steamer De Soto and her owners, the said Nathaniel S. Waring, Peter Dalman, and Parker, are liable *in solido*, and should be compelled to pay.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court; in verification whereof, if denied, the libellant craves leave to refer to the depositions and proofs to be by him exhibited in this cause; and libellant further alleges, that he has reason to fear that the said steamer De Soto will depart in less than ten days beyond the jurisdiction of this honorable court.

Wherefore libellant prays, that process in due form of law, according to the course of courts of admiralty and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamboat De Soto, her tackle, apparel, machinery, and furniture; and the said Nathaniel S. Waring, Peter Dalman, and Parker, who is the clerk of said boat, may be cited, as well as all other persons having or pretending to have any right, title, or interest therein, to appear and answer all and singular the matters so articulately pro-

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pounded herein. That after monition, and other due proceedings according to the laws and usages of admiralty, that this honorable court may pronounce for the damages aforesaid, and condemn the said Nathaniel S. Waring, Peter Dalman, and Parker, and all other persons intervening for their interest in said boat, to pay *in solido* the sum of sixteen thousand dollars to libellant; and also to decree and condemn the said steamer De Soto, her tackle, apparel, and furniture, to be sold to satisfy by privilege and preference the claim of your libellant, with his costs in this behalf expended, and \*445] *for* such other and further decree be rendered in the premises as to right and justice may appertain; and your libellant will ever pray, &c.

W. S. VASON, *Proctor*.

Thomas Clarke, being duly sworn, deposeth, that the material allegations of the above libel are true.

(Signed,)

THOMAS CLARKE.

Upon this libel, the judge ordered admiralty process *in rem* to issue against the steamboat De Soto, and also process *in personam* against the owners, citing them to appear and answer the libel. The answer was as follows:—

To the Honorable Theo. H. McCaleb, Judge of the District Court of the United States, within and for the Eastern District of Louisiana.

And now Peter Dalman, of the city of Lafayette, in the district aforesaid, and Nathaniel S. Waring, intervening for their interest in the said steamboat De Soto, and for answer to the libel and complaint of Thomas Clarke, as late master of the steamboat Luda, and agent of P. F. Marionoux and T. J. Abel, late owners of the steamboat Luda, against the steamboat De Soto, her tackle, apparel, &c., and against Peter Dalman, and Nathaniel S. Waring, and Parker, as owners of the said steamboat De Soto, and also against all persons intervening for their interest in said steamboat De Soto, allege and articulately propound as follows:—

First. That the respondents are the true and lawful owners of the said steamboat De Soto.

Second. That it doth appear from the allegations of the said libel, and these respondents expressly propounded and allege the fact to be so, that the trespass, tort, or collision set forth and alleged in the said libel, if any such did take place in the manner and form set forth in said libel, which these respondents most respectfully deny, was on the river Missis-

issippi, off and near the mouth of the Bayou Goula, about ninety-five miles above the city of New Orleans, within the State of Louisiana, within the body of a county or parish of said State, to wit, the parish of Iberville or county of Iberville, in said State.

Third. The tide does not ebb and flow at the place where the said collision, tort, or trespass is alleged to have taken place.

Fourth. That it is not alleged in said libel, and these respondents aver and propound that the said collision did not take place on the high seas, or in sailing or navigating to or from the sea.

Fifth. That neither the said steamboat Luda, nor the said steamboat De Soto, were, at the time the said collision took place, or the tort or trespass aforesaid is alleged to have been committed, employed in sailing or navigating on any maritime voyage, but were wholly employed, and then were actually pursuing a voyage confined \*to the river Mississippi, to wit, the said steamboat Luda on a voyage [ \*446 from the city of New Orleans to Bayou Sarah, about one hundred and sixty miles above the said city, and the said steamboat De Soto on a voyage or trip from Bayou Sarah aforesaid to the city of New Orleans, where her said voyage or trip was to end.

Sixth. That neither the said steamboat Luda, nor the said steamboat De Soto, were built, designed, or fitted, or ever intended to be employed or used in any manner for a maritime or sea voyage, nor have they, or either of them, ever been used, employed, or engaged in any such maritime or sea voyage, but were wholly built, designed, or intended for the navigation of the said river Mississippi, or other rivers or streams entering therein, and the transportation of goods and passengers from the said city of New Orleans up the said river or streams to the interior of the country, and the transportation of passengers, goods, cotton, and other produce of the country from the landings, and places, and plantations of the inhabitants on the bank or banks of said rivers and streams to the said city of New Orleans, without proceeding any further down the said river Mississippi, nearer to its mouth or to the sea, and were both so employed at the time the said collision, trespass, or tort is alleged to have been committed.

Seventh. That this honorable court, by reason of all the matters and things so above propounded and articulated, has not jurisdiction; and ought not to proceed to enforce the claim alleged in the libel aforesaid against the said steamboat

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De Soto, or against them, these respondents, intervening for their interest, or against these respondents in their proper persons, as prayed for in and by said libel.

Eighth. That all and singular the premises are true; in verification whereof, if desired, these respondents crave leave to refer to the depositions and other proof to be by them exhibited in this cause. And the said respondents, in case their said plea to the jurisdiction of the court, so as above propounded, articulated, and pleaded, should be overruled, then they, for further defensive answer, articulately propound and say,—

1st. That they admit that the said two steamboats did come into collision at the time stated in the said libel, but they do expressly deny that the said collision was caused or did happen by any fault, negligence, or intention of these respondents, or the master, officers, or crew of the said steamboat De Soto, or any other person or persons for whom these respondents, or the said steamboat De Soto, can in any manner be liable or responsible.

2d. That the said collision was caused by the fault or negligence, or want of skill, in the person or persons having charge or command of the said steamboat Luda, or the pilots, officers, or crew of said steamboat, or that the same was by accident, for which these respondents are not liable.

\*447] 3d. That the said sinking of the said steamboat Luda, and her loss alleged in said libel, was not caused by any damage she received in the collision aforesaid, but by the negligence, want of skill, and fault of the person or persons in charge of the said steamboat Luda.

4th. That at the time the said collision did take place the said steamboat Luda was not seaworthy, and was not properly provided with a commander and other usual and necessary officers of competent skill to manage and conduct the said steamboat, by reason of which the collision aforesaid did take place, and the said boat did afterwards sink.

5th. That the said steamboat De Soto did suffer a great damage by the said collision, to the amount of five hundred dollars, and these respondents have and will suffer great damage by the seizure and detention of said steamboat De Soto under the process issued in this case, and to the amount of five thousand dollars.

Wherefore, and by reason of all the matters and things herein propounded and pleaded, these respondents pray that this honorable court will pronounce against the said libel, that the same may be dismissed, and the said steamboat De Soto

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restored to your respondents, with all costs in this behalf expended.

That your Honor may pronounce for the damages claimed by these respondents, as before stated, and condemn the libellants to pay the same, *in solido*, to these respondents, and that your respondents may have all such other and further order, decree, and relief in the premises as to law and justice may appertain, and the nature of their case may require.

(Signed,)

PETER DALMAN,  
N. S. WARING.

The supplemental libel was as follows:—

To the Honorable Theo. H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The amended and supplemental libel of Thomas Clarke, late master of the steamboat Luda, and agent of the owners thereof, &c., against the steamboat De Soto, her tackle, apparel, and furniture, and against Nathaniel S. Waring, Peter Dalman, and Parker, owners thereof, &c., &c., and against all persons intervening for their interest in the steamer De Soto, &c., in a cause of collision, civil and maritime, &c., filed herein by leave of this honorable court, first granted and obtained, to amend his original libel herein filed and pending in said court.

And thereupon the said Thomas Clarke, as master and agent as aforesaid, doth allege and articulately propound, as amendatory and supplemental to the allegations articulately propounded in his said original libel, as follows:—

\*First. That at the time of the collision between the said steamboats, the said De Soto and the said Luda, set forth and described in the second article of his original libel, to wit, on the first day of November, 1843, and for a considerable time previous thereto, both of said boats were employed as regular packets, running between the port of New Orleans and the town of Bayou Sarah, situate on the bank of the Mississippi river, about one hundred and sixty miles from the city of New Orleans, carrying freight and passengers for hire between said places; and the said steamboat De Soto was, at the time the said collision took place, returning from the said town of Bayou Sarah, on a voyage or trip to the city of New Orleans, and the steamboat Luda was, at the said time, going on a voyage or trip from the city of New Orleans to the said town of Bayou Sarah; and libellant expressly alleges, that both of said boats were contracted for, intended

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and adapted to, and were actually engaged in, navigating tide-waters at the time of said collision, running and making trips between the city of New Orleans and the said town of Bayou Sarah, in the river Mississippi, between which places the tide ebbs and flows the entire distance; and that the place where the said collision happened, to wit, the Bayou Goula bar in the river Mississippi, and also the said town of Bayou Sarah, and the entire distance between the said town and the city of New Orleans, are within the admiralty and maritime jurisdiction of this honorable court.

Second. That on the night the collision took place between the said boats, to wit, on the night of the first day of November, 1843, there were not two lights hoisted out on the hurricane-deck of the said boat De Soto, one forward, the other at the stern, of said boat; nor did the master and pilot of the said boat De Soto, or either of them, when the said boat, then descending the said river Mississippi, was within one mile of the boat Luda, then ascending said river, shut off the steam of the said boat De Soto, nor permit the said boat to float down upon the current of said river until the said boat Luda passed the said boat De Soto, as the laws of this State require boats descending said river to do, when meeting boats ascending said river; and libellant expressly alleges, that said master and pilot of the De Soto did neglect or refuse to comply with the requirements of said law of this State, as well with the usage and customs observed by all boats navigating said river, and that, had the said master and pilot not neglected or refused to comply with the requirements of said law, but conformed thereto, and observed the said usage and customs established by boats navigating said river, by shutting off the steam of the De Soto as soon as they discovered the Luda, or had approached within one mile of her, and permitted the De Soto to float upon the current of said river until the Luda had passed the De Soto, \*449] the said collision would not have occurred between the said boats, nor would the said De Soto have run foul of and against the said Luda, as set forth in the second article of his original libel.

Third. That at the time of said collision, the said steamer Luda was earning freight, being employed by libellant in fulfilling certain verbal contracts of affreightment, entered into by and between him and the Port Hudson, and Clinton, and West Feliciana railroad companies, and various planters, in the month of October, 1843, to transport all the cotton, and sugar, and produce of the country, which said railroad companies and planters might deliver on the banks of the river



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Mississippi, within the ebb and flow of the tide on said river, to the city of New Orleans during the business season, to wit, from the 1st of October, 1843, to 1st of May, 1844; that the said boat Luda would have earned during said period, by carrying freight in pursuance of said contracts of affreightment, and in the fulfilment and discharge thereof, over and above all expenses, the sum of eight thousand dollars profit for libellant; that by reason of the sinking and destruction of the said steamer Luda, by being run foul of by the said De Soto, as herein and in his original libel is particularly set forth and alleged, libellant has been compelled to forfeit said contracts of affreightment, and to lose the amount of the freight which the said Luda would have earned by fulfilling said contracts, which he would have done, had he not been prevented by the sinking and destruction of said Luda by the said De Soto, to wit, the sum of eight thousand dollars, which sum libellant claims as damages sustained by him resulting from said collision, in addition to the value of said boat Luda, claimed in his original libel, to wit, the sum of sixteen thousand dollars, which two sums make the sum of twenty-four thousand dollars; and libellant expressly alleges, that he has sustained damages to the amount of twenty-four thousand dollars, by reason of the sinking and destruction of the said steamboat Luda by the said boat De Soto, and that the said boat De Soto and owners are liable, and ought to be compelled to pay said sum.

Fourth. That all and singular the premises are true, in verification whereof, if denied, libellant craves leave to refer to depositions and other proof, to be by him exhibited on the trial of this case

Wherefore, in consideration of the premises, libellant reiterates his prayer in his original libel, unto the citations of the owners of the said boat De Soto, and condemnation of said boat, and prays that the said owners may be condemned to pay, *in solido*, the sum of twenty-four thousand dollars, with all costs in this behalf expended to libellants, and for such other and further relief in the premises as to justice and equity may appertain, &c.

(Signed,)

THOMAS CLARKE.

The supplemental answer was as follows:—

\*To the honorable Theo. H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana. [\*450

The amended and supplemental answer of Peter Dalman

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and Nathaniel S. Waring, claimants and respondents in the case now pending in this honorable court, of *Thomas Clarke, late Master of Steamer Luda, for himself and others, owners of said Steamer, v. The Steamer De Soto*, and these respondents with leave of the court first granted and obtained to amend their answer; and thereupon the said respondents and claimants do allege and articulately propound as follows:—

First. They admit that the steamers *Luda* and *De Soto*, at the time of the collision, were actually engaged in the Bayou Sarah trade, and had been so engaged for a short time previous thereto; but they deny that said boats were contracted for or used in navigating tide-waters, and allege that the steamer *De Soto* was contracted and used for the Red River trade, where the tide neither ebbs nor flows; and for the reasons given, and for facts stated in their original answer, that this honorable court has not jurisdiction.

Second. They deny all the allegations in the second article of said amended libel, and allege that the steamer *De Soto* was lightened, managed, and guided in a proper, careful, and lawful manner, at and before the time of collision, and subsequently thereto.

Third. They deny all the allegations of libellant in the third article of said amended libel, and they further say, that even if the libellant should show, on the trial of this cause, or be permitted to do so, which should not be allowed, that they have suffered or sustained consequential damages from said collision, that said libellant has no right to recover such damages from the respondents; they therefore pray that no such claim be allowed the libellants, and that these respondents and claimants may have judgment, as prayed for in the original answer and claim.

(Signed,)

JNO. R. GRYMES,

WM. DUNBAR,

*Proctors for Defendants.*

Upon the two questions of fact raised in these libels and answers,—viz., 1st, the extent to which the tide ebbs and flows up the Mississippi river, and, 2d, to whose fault the collision was to be attributed,—a great body of evidence was taken, which it is not thought necessary to insert.

On the 24th of January, 1844, the following judgment was entered by the District Judge:—

“The court, having duly considered the law and evidence in this cause, and for reasons that hereinafter will be given in length and filed in court, doth now order, and adjudge,

and decree that the plea to the jurisdiction be overruled, and that the libellants do recover from the steamboat De Soto and owners, Peter Dalman and \*Nathaniel S. Waring, [\*451 the sum of twelve thousand dollars, and the costs of suit; and it is further ordered, that the steamboat De Soto be sold, after the usual and legal advertisements, and that the proceeds thereof be deposited in the registry of the court, subject to its further order."

From this judgment an appeal was filed to the Circuit Court.

In April, 1844, the appeal came on to be heard in the Circuit Court, when much additional testimony was produced, and on the 29th April the court ordered that the exception to the jurisdiction of the court should be dismissed, and the cause proceed on its merits.

On the 6th of May, 1844, the Circuit Court affirmed the decree of the District Court, with costs, from which an appeal was taken to this court.

The cause was argued by *Mr. Johnson*, for the appellants, and *Mr. Crittenden*, for the appellees, upon the two grounds, first, of the jurisdiction of the court, and second, on the facts of the case.

The question of jurisdiction came up again, covering additional points, in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*, which was argued by *Mr. Ames* and *Mr. Whipple*, for the appellants, and *Mr. Greene* and *Mr. Webster*, for the appellees. The discussion in the latter case took a wider range than in that now under review, and the reporter prepared himself with a full report of the arguments of counsel, upon the entire subject of jurisdiction. But the court having ordered the *New Jersey Company* case to be continued and reargued, the reporter is not at liberty, of course, to make use of the materials, and is obliged to submit the report of the case of the two steamboats to the profession without any arguments of counsel.

Mr. Justice WAYNE delivered the opinion of the court.

This is a libel *in rem*, to recover damages for injuries arising from a collision, alleged to have happened within the ebb and flow of the tide in the Mississippi river, about ninety-five miles above New Orleans.

The decree of the Circuit Court is resisted upon the merits, and also upon the ground that the case is not within the admiralty and maritime jurisdiction of the courts of the United States.

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We will first consider the point of jurisdiction.

The learned counsel for the appellants, *Mr. Reverdy Johnson*, contended, that, even if the evidence proved that the collision took place within the ebb and flow of the tide, the court had not jurisdiction, because the locality is *infra corpus comitatus*.

Two grounds were taken to maintain that position.

1. That the grant in the constitution of "all cases of admiralty and maritime jurisdiction" was limited to what \*452] were cases of "admiralty and maritime jurisdiction in England when our Revolutionary war began, or when the constitution was adopted, and that a collision between ships within the ebb and flow of the tide, *infra corpus comitatus*, was not one of them.

2. That the distinguishing limitation of admiralty jurisdiction, and decisive test against it in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And as auxiliary to this ground it was urged, that the clause in the ninth section of the Judiciary Act of 1789 (1 Stat. at L., 77), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," took away such cases from the admiralty jurisdiction of the courts of the United States.

The same positions have been taken again by *Mr. Ames* and *Mr. Whipple*, in the case of the *New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*. Every thing in support of them, which could be drawn from the history of admiralty jurisdiction in England, or from what had been its practice in the United States, and from adjudged cases in both countries, was urged by those gentlemen. All must admit, who heard them, that nothing was omitted which could be brought to bear upon the subject. We come, then, to the decision of these points, with every advantage which learned research, and ingenious and comprehensive deduction from it, can give us.

It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be in the sense in which it is used by the common law judges in England, *infra corpus comitatus*. It is this point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be

extended to embrace any other case of contested admiralty jurisdiction.

We do not think that either of the grounds taken can be maintained. But before giving our reasons for this conclusion, it will be well for us to state the cases in which the instance court in England exercised jurisdiction when our constitution was adopted.

In cases to enforce judgments of foreign admiralty courts, when the person or his goods are within the jurisdiction. Mariners' wages, except when the contract was under seal, or made out of the customary way of such contracts. Bottomry, in certain cases only, and under many restrictions. Salvage, when the property shipwrecked was not cast ashore. Cases between the several owners of ships, when they disputed among themselves about the policy or advantage of sending her upon a particular voyage. In cases of goods, and the proceeds of goods piratically taken, which will be arrested by a \*warrant from the court, as belonging to the crown and as droits of the admiralty. And in [\*453 cases of collision and injuries to property or persons on the high seas.

It may as well be said by us, at once, that, in cases of this last class, it has frequently been adjudicated in the English common law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the open coast; and that any branch of the sea within the *fauces terræ*, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 and 15 Richard II. and 2 Henry IV., to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising *infra corpus comitatus*. So sternly has the admiralty been excluded from what we believe to have been its ancient jurisdiction in England, that a prohibition within a few years has been issued in a case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the river Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. *The Public Opinion*, 2 Hagg. Adm., 398.

It has not, however, been the undisputed rule, nor allowed to be the correct interpretation of the statutes of Richard. It has always been contended by the advocates of the admiralty, that ports, creeks, and rivers are within its jurisdiction,

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and not within those statutes; meaning that the ancient jurisdiction in such localities was not excluded by the words of the statutes. Browne, however, in his *Civil and Admiralty Law*, vol. 2, p. 92, thinks they were within the words of the statutes; not meaning, though, to affirm the declaration of Lord Coke, that those statutes were affirmative of the common law. We think they were not. However much every true English and American lawyer may feel himself indebted to the learning of that great lawyer, and will ever be cautious of disparaging it, it is difficult for any one to read and reflect upon the part which he took in the controversy upon admiralty jurisdiction in England, without assenting to Mr. Justice Buller's remarks, in *Smart v. Wolf*, 3 T. R., 348:—"With respect to what is said relative to the admiralty jurisdiction in 4th Inst., 135, I think that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction. The passage in 4th Inst., 135, disallowing the right to take stipulations, is expressly denied in 2 Ld. Raym., 1826. And I may conclude with the words of Lord Holt in that case, and in this case 'the admiralty had jurisdiction, and there is neither statute nor common law to restrain them.'"

\*454] \*Having thus admitted, to the fullest extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken, that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States.

We have already said it cannot be maintained. It is opposed by general, and also by constitutional considerations, to which we have not heard an answer.

In the first place, those who framed the constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the States when they were colonies, than was allowed in England, from the interpretation which was given by the common law courts to the restraining statutes of Richard II. and Henry IV. The commissions to the vice-admirals in the colonies in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted. That to the governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well

of the sea as of the rivers and coasts whatsoever, of our said provinces."

In a work by Anthony Stokes, his Majesty's chief justice in Georgia, entitled, "A View of the Constitution of the British Colonies in North America and the West Indies," will be found, at page 166, the form of the commission of vice-admiral for the provinces in North America. He says, in page 150, the dates in the commission are arbitrary, and the name of any particular province is omitted. Its language is,—“And we do hereby remit and grant unto you, the aforesaid A. B., our power and authority in and throughout our province of — afore mentioned, &c. &c., and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of F.” The extracts from both commissions are the same. We have the authority of Chief Justice Stokes, that all given in the colonies were alike. The jurisdiction given in those commissions is as large as was exercised in the ancient practice in admiralty in England. It should be observed, too, that they were given long before any difficulties occurred between the mother country and ourselves, and that they contained no power complained of by us afterwards, when it was said an attempt was made to extend admiralty powers “beyond these ancient limits.” The king's authority to grant those commissions in the colonies has never been, and cannot be, denied. In all the appeals taken from the colonial courts to the High Court of Admiralty in England, no such thing was ever intimated.

Was it not known, also, that, whilst the States were colonies, \*vice-admiralty courts had been in all of [\*455 them,—in some, as has just been said, by commissions from the crown, with additional powers conferred upon them by acts of Parliament; in others, by rights reserved in their charters, and in other colonies by their own legislation?—that, whether from either source, they exercised a jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas?—that acts of Parliament recognized their jurisdiction as original maritime jurisdiction, in all seizures for contravention of the revenue laws?

Was not a larger jurisdiction in admiralty exercised in Massachusetts, throughout her whole colonial existence, than was permitted to the admiralty in England by the prohibitions of her common law courts? Were her members in the convention which formed our constitution ignorant of it?

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Were the members from Pennsylvania and South Carolina forgetful, that the extent of the admiralty jurisdiction in the colonies had been the subject of judicial inquiry in England, growing out of proceedings in the admiralty courts of both of those States in revenue cases?—that it had been decided in 1754, in the case of the *Vrow Dorothea*, 2 Rob., 246,—which was an appeal from the vice-admiralty judge in South Carolina to the High Court of Admiralty, and thence to the delegates,—that the jurisdiction in admiralty in the colonies for a breach of the revenue laws was in its nature maritime, and was not a jurisdiction specially conferred by the statute of William III., ch. 22, § 6; a judgment which subsequently received the assent of all the common law judges, in a reference to them from the privy council? 2 Rob., 246; 8 Wheat., 397, note. This, too, after an eminent lawyer, Mr. West, assigned as counsel to the Commissioners of Trade and Plantations, had in 1720 expressed the opinion, that the statutes of 13 and 15 Richard II., ch. 8, and 2 Henry IV., ch. 11, and 27 Elizabeth, ch. 11, were not introductive of new laws, but only declarative of the common law, and were therefore of force in the plantations; and that none of the acts of trade and navigation gave the admiralty judges in the West Indies increase of jurisdiction beyond that exercised by the High Court of Admiralty at home.

Shall it be presumed, also, that the members of the convention were altogether disregarding of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, “and \*the uncertainty of jurisdiction in the  
\*456] trial of maritime causes,” which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Vir-



ginia. In New York, also, there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England.

Further, the proceedings of our Continental Congress in 1774 afford reasons for us to conclude that no such limitation was meant. The admiralty jurisdiction, ancient and circumscribed as it afterwards was in England, and as it was exercised in the colonies, was necessarily the subject of examination, when the Congress was preparing the declaration and resolves of the 14th October, 1774; in which it is said, "that the several acts of 4 George III., ch. 15, 34; 5 Geo. III., ch. 25; 6 Geo. III., ch. 52; 7 Geo. III., ch. 41; and 8 Geo. III., ch. 22, which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits." *Journal of Congress, 1774, 21.* Again, when it was said (*Journal, 33*), after reciting other grievances under the statute of 1767,—“And amidst the just fears and jealousies thereby occasioned, a statute was made in the next year (1768) to establish courts of admiralty on a new model, expressly for the end of more effectually recovering of the penalties and forfeitures inflicted by acts of Parliament, framed for the purpose of raising revenue in America.” And again, in the address to the king (*Journal, 47*), it is said,—“By several acts of Parliament, made in the fourth, fifth, sixth, seventh, and eighth years of your Majesty’s reign, duties are imposed upon us for the purpose of raising a revenue, and the powers of the admiralty and vice-admiralty courts are extended beyond their ancient limits; whereby our property is taken from us without our consent,” &c. Why this repeated allusion to the ancient limits of admiralty jurisdiction, by men fully acquainted with every part of English jurisprudence, if they had not believed it had existed in England at one time much beyond what was at that time its exercise in her admiralty courts?

With these proceedings of the Continental Congress every member of the convention which framed the constitution was familiar. They knew, also, what had been the extent and the manner of the exercise of admiralty jurisdiction in the States, after the war began, until the articles of confederation had been ratified,—what it had been thence to the adoption of the constitution. Advised, as they were by personal experience, of the difficulties which attended the [\*457 \*separate exercise by the States of admiralty powers, before the confederation was formed, and afterwards from the restricted grant of judicial power in its articles, can it be

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supposed, in framing the constitution, when they were endeavouring to apply a remedy for those evils by getting the States to yield admiralty jurisdiction altogether to the United States, it was intended to circumscribe the larger jurisdiction existing in them to the limited cases, and those only then allowed in England to be cases of admiralty and maritime jurisdiction?—that the latter was exclusively intended, without any reference to the former, with which they were most familiar? Can it be reasonable to infer that such were the intentions of the framers of the constitution? Is it not more reasonable to say,—nay, may we not say it is certain,—that, in their discussions and thoughts upon the grant of admiralty jurisdiction, they mingled with what they knew were cases of admiralty jurisdiction in England what it actually was and had been in the States they were representing, with an enlarged comprehension of the controversy which had been carried on in England for more than two hundred years, between the judges of the common law courts and the admiralty, upon the subject of its jurisdiction? Besides, nothing can be found in the debates of the convention, nor in its proceedings, nor in the debates of the conventions in the States upon the constitution, to sanction such an idea. It is remarkable, too, that the words, “all cases of admiralty and maritime jurisdiction,” as they now are in the constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately. That would not have been accomplished, if it had been intended to limit the power to the few cases of which the English courts took cognizance.

But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of “all cases of admiralty and maritime jurisdiction,” as it is expressed in the constitution, to the cases of admiralty and maritime jurisdiction in England when our constitution was adopted. To do so would make the latter a part and parcel of the constitution,—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the constitution, that unalterable by any legislation of ours,

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which can at any time be changed by the Parliament of England,—a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States “to all \*cases of admiralty and maritime jurisdiction.” One extension [\*458 of the jurisdiction of the courts of the United States exists beyond the limitation proposed, just as it existed in the colonies before they became independent States, which never has been a case of admiralty jurisdiction in England. We mean seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within the respective districts of the courts, as well as upon the high seas. And this, we have shown in a previous part of this opinion, was decided in England as early as 1754, with the subsequent assent of the common law judges, not to be a jurisdiction conferred upon the courts of admiralty in the colonies by statutes, but was a case in the colonies of admiralty jurisdiction (2 Rob., 246). And so it is treated in the ninth section of the Judiciary Act of 1789. We cannot help thinking that section—a declaration by Congress contemporary with the adoption of the constitution—very decisive against the limitation contended for by counsel in this case. Again, this court decided, as early as 1805 (2 Cranch, 405), in the case of the *Sally*, that the forfeiture of a vessel, under the act of Congress against the slave-trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of the *La Vengeance* (3 Dall., 397). Again, Congress, by an act passed the 19th of June, 1813 (3 Stat. at L., 2), declared that a vessel employed in a fishing voyage should be answerable for the fishermen’s share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is by law liable to be proceeded against for the wages of seamen or mariners in the merchant service. We shall cite no more, though we might do so, of legislative and judicial interpretations, to show that the admiralty jurisdiction of the courts of the United States is not confined to the cases of admiralty jurisdiction in England when the constitution was adopted.

No such interpretation has been permitted in respect to any other power in the constitution. In what aspect would it not be presented, if applied to the clause immediately preceding the grant of admiralty jurisdiction,—“to all cases affecting ambassadors, other ministers, and consuls”? Is that grant, too, to be interpreted by the jurisdiction which the English common law courts exercise in cases affecting those function-

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aries, or to be regulated by what Lord Coke says, in 4 Inst., 152, to be their liabilities to punishment for offences? Try the interpretation proposed by its application to the grant to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." Would it not result in this, that all the power which Congress had under that grant was the bankrupt system of England as it existed there when the constitution was adopted? Such a limitation upon that clause we deny. We think we may very safely say, such \*459] interpretations of \*any grant in the constitution, or limitations upon those grants, according to any English legislation or judicial rule, cannot be permitted. At most, they furnish only analogies to aid us in our constitutional expositions. We therefore conclude, that the grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted.

We will now consider the proposition, that the test against admiralty jurisdiction in England and the United States is the competency of a court of common law to give a remedy in a given case in a trial by jury; or that in all cases, except in seamen's wages, where the courts of common law have a concurrent jurisdiction with the admiralty, and can try the cause and give redress, that alone takes away the admiralty jurisdiction. It has the authority of Lord Coke to sustain it. But it was the effort and the design of Lord Coke to make locality the boundary in cases of contract, as well as in tort, that is, to limit the jurisdiction in admiralty to contracts made on the sea and to be executed on the sea; and to exclude its jurisdiction in all cases of marine contracts made on the land, though they related exclusively to marine services, principally to be executed on the sea. To that extent the admiralty courts were prohibited by the common law judges from exercising jurisdiction, until the unreasonableness and inconvenience of the restriction forced them to relax it in the case of seamen's wages. Then it was that the common law courts began to reflect upon what jurisdiction in admiralty rested, and upon the principles upon which it would attach. With the acknowledgment of all of them ever since, it was affirmed that the subject-matter, and not locality, determined the jurisdiction in cases of contract. Passing over intermediate decisions showing the manner and the reasons given for the relaxation in the one case, and the revival of the other, for which the admiralty always contended, we will cite the case of *Menetone v. Gibbons*, 3 T. R., 269, 270. Lord Kenyon and Sir Francis Buller say, in that case.

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the question whether the admiralty has or has not jurisdiction depends upon the subject-matter. We wish it to be remarked, however, that the manner of proceeding is another affair, with which we do not meddle now.

It was only upon the principle that the subject-matter in cases of contract determined the jurisdiction, that this court decided the cases of *The Aurora*, 1 Wheat., 96, *The General Smith*, 4 Id., 438, and *The St. Jago de Cuba*, 9 Id., 409.

If, then, in both classes of civil cases of which the instance court has jurisdiction, subject-matter in the one class, and locality in the other, ascertains it, neither a jury trial nor the concurrent jurisdiction of the common law courts can be a test for jurisdiction in either class. Crimes, as well those of which the admiralty has jurisdiction as those of which it has not, except in cases of impeachment, the \*constitution declares shall be tried by a jury. But there [\*460 is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved. Cases under twenty dollars are not so provided for. Does not the specification of amount show the class of suits meant in the amendment, if any thing could show it more conclusively than the term "suits at common law"?

Suits at common law are a distinct class, so recognized in the constitution, whether they be such as are concurrent with suits of which there is jurisdiction in admiralty, or not. Can concurrent jurisdiction imply exclusion of jurisdiction from tribunals, in cases admitted to have been cases in admiralty, without trial by jury? Again, suits at common law indicate a class, to distinguish them from suits in equity and admiralty; cases in admiralty another class distinguishable from both, as well as to the system of laws determining them as the manner of trial, except that in equity issues of fact may be sent to the common law courts for a trial by jury. Suppose, then, the seventh amendment of the constitution had not been made, suits at the common law and in admiralty would have been tried in the accustomed way of each. But an amendment is made, inhibiting any law from being passed which shall take away the right of trial by jury in suits at common law. Now by what rule of interpretation or by what course of reasoning can such a provision be converted

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into an inhibition upon the mode of trial of suits which are not exclusively suits at common law, recognized, too, as such by the constitution, for the trial of which Congress can establish courts which are not courts of common law, but courts of admiralty, without or with a jury, in its discretion, to try all issues of fact? Tried in either way, though, they are still cases in admiralty, and this power in Congress, under the grant of admiralty jurisdiction, to try issues of fact in it by jury, being as well known when the seventh amendment was made as it is now, is conclusive that it was done with reference to suits at common law alone. There is no escape from this result, unless it is to be implied that the amendments were proposed by persons careless or ignorant of the difference in the mode of trial of suits at common law and in admiralty. But they were not so, for we find some of them in Congress, a few months after, preparing and concurring in the enactment of a law, that the "trials of issues in fact in the District Courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."

In respect to the clause in the ninth section of the Judiciary Act,—“saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it.” \*461] —we \*remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain,—securities which a court of common law cannot give.

Having disposed of the objections to the jurisdiction of the courts of admiralty of the United States, growing out of the supposed limitation of them to the cases allowed in England and from the test of jury trial, we proceed to consider that objection to jurisdiction in this case, because the collision took place *infra corpus comitatus*. We have admitted the validity of this objection in England, but on the other hand it cannot be denied that the restriction there to cases of collision happening *super altum mare*, or without the *fauces*

*terrae*, was imposed by the statutes of Richard, contrary to what had been in England the ancient exercise of admiralty jurisdiction in ports and havens within the ebb and flow of the tide. We have seen no case, ancient or modern, from which it can correctly be inferred, that such exercise of jurisdiction was prohibited by mere force of the common law. The most that can be said in favor of the statutes of Richard being affirmative of the common law, are the assertions of Lord Coke and the prohibitions of the common law courts, subsequent to those statutes, and founded upon them, restricting the jurisdiction of the courts of admiralty to cases of collisions happening upon the high seas; contrary to what we have already said was its ancient jurisdiction in ports and havens in cases of torts and collision, and certainly in opposition to what was then, and still continues to be, the admiralty jurisdiction, in cases of collision, of every other country in Europe.

But giving to such prohibitions of the courts of common law the utmost authority claimed for them,—that is, that they are affirmances of the common law as interpretations of the statutes of Richard,—does it follow that they are to be taken as a rule in the admiralty courts of the United States in cases of collision? Must it not first be shown that the statutes of Richard were in force as such in America, and that the colonies considered and adopted that portion of the common law as applicable to their situation? Now, the statutes of Richard were never in force in any of the colonies, except as they were adopted by the legislation of some of them; and the common law only in its general principles, as they were \*applicable, with such portions of it as were [\*462 adopted by common consent in any one of the colonies, or by statute. This being so, the rule in England for collision cases being neither obligatory here by the statutes of Richard nor by the common law, we feel ourselves permitted to look beyond them, to ascertain what the locality is which gives jurisdiction to the courts of the United States in cases of collision or tort, or what makes the subject-matter of any service or undertaking a marine contract. Are we bound to say, because it has been so said by the common law courts in England in reference to the point under discussion, that *sea* always means *high sea*, or the *main sea*?—that the waters flowing from it into havens, ports, and rivers are not “parcel of the sea”?—that the fact of the political division of a country into counties makes it otherwise, and takes away the jurisdiction in admiralty, in respect to all the marine means of commerce and the injuries which may be done to vessels

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in their passage from the sea to their ports of destination, and in their outward-bound voyages until they are upon the high sea? Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than the designation of it by the common law courts in England? Especially when the latter has in no instance been applied by England as a limitation upon the general admiralty law in any of her colonies; and when in all of them, until the act of 2 William IV., c. 51, was passed, the commissions gave to her vice-admirals jurisdiction "throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever." Besides, the use of the word *sea* to fix admiralty jurisdiction, and what part of it might be within the body of a county, have not been settled points among the common law judges in England. Lord Hale differed from Lord Coke. The former, in defining what the sea is, says,—“that it is either that which lies within the body of the county or without; that arm or branch of the sea which lies within the *fauces terræ* is, or at least may be, within the body of a county; that part which lies not within the body of a county is called the main sea.” It is difficult to reconcile the differences of opinion and of definition given by the common law courts in Lord Coke’s day, and for fifty years afterwards, as to the meaning and legal application of the word *sea*, so as to make a practical rule to govern the decisions of cases, or to determine what were cases of admiralty jurisdiction. But there is no difficulty in making such a rule, if the construction of it, by the admiralty courts, is adopted. In that construction, it meant not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows. We think in the controversy between the courts of admiralty and common law, upon the subject of jurisdiction, that the \*468] former have the best of the argument; that they \*maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries.<sup>1</sup> The conclusions of the admiralty, too, are more congenial with our geographical condition. We may very reasonably infer they were thought so on that account by the framers of the constitution when the judicial grant was expressed by them in the words,—“all cases of admiralty and maritime jurisdiction.” In those words it is

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<sup>1</sup> See *Insurance Co. v. Dunham*, 11 Wall., 26.



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given by Congress to the courts, leaving to them the interpretation of what were such cases; as well the subject-matter which makes them so, as the locality which gives admiralty jurisdiction in cases of tort and collision. The grant, too, has been interpreted by this court in some cases of the first class, which leaves no doubt upon our minds as to the locality which gives jurisdiction in the other. We do not consider it an open question, but *res adjudicata* by this court. In *Peyroux et al. v. Howard & Varion*, 7 Pet., 342, the objection to the jurisdiction was overruled, upon the ground that the subject-matter of the service rendered was maritime, and performed within the ebb and flow of the tide, at New Orleans. The court say, although the current in the Mississippi at New Orleans may be so strong as not to be turned backward by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide. The material consideration is, whether the service is essentially a maritime service and to be performed on the sea or on tide water.<sup>1</sup> In the case of *The Steamboat Orleans v. Phœbus*, 11 Pet., 175, the jurisdiction of the court was denied, on the ground that the boat was not employed or intended to be employed in navigation and trade on the sea, or on tide waters. In *Steamboat Jefferson*, Johnson claimant, 10 Wheat., 428, this court says,—“In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, *on the sea or upon waters within the ebb and flow of the tide*. This is the prescribed limit, which it was not at liberty to transcend. We say, the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment.” In *United States v. Coombs*, 12 Pet., 72, where the

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<sup>1</sup> CITED. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 392; and see *Id.*, 422, 425, 430, 431.

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\*464] question certified to the court directly involved what was \*the admiralty jurisdiction, under the grant of "all cases of admiralty and maritime jurisdiction," the language of this court is,—“The question which arises is, What is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to *tide waters, as far as the tide flows*; and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court; and we see no reason to depart from it.” Now, though none of the foregoing cases are cases of collision upon tide waters, but of contracts, services rendered essentially maritime, and in a case of wreck,—the point ruled in all of them, as to the jurisdiction of the court in tide water as far as the tide flows, was directly presented for decision in each of them. The locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening in it. Our conclusion is, that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus*; that the case before us did happen where the tide ebbed and flowed *infra corpus comitatus*, and that the court has jurisdiction to decree upon the claim of the libellant for damages.

Before leaving this point, however, we desire to say that the ninth section of the Judiciary Act countenances all the conclusions which have been announced in this opinion. We look upon it as legislative action contemporary with the first being of the constitution, expressive of the opinion of some of its framers, that the grant of admiralty jurisdiction was to be interpreted by the courts in accordance with the acknowledged principles of general admiralty law. In that section the distinction is made between high seas and waters which are navigable from the sea by vessels of ten or more tons burden. Admiralty jurisdiction is given upon both, and though the latter is confined by the language to cases of seizure, it is so with the understanding that such cases were strictly of themselves within the admiralty jurisdiction. It declares that issues of fact in civil causes of admiralty and maritime jurisdiction shall not be tried by a jury, and makes so clear an assignment to the courts of jurisdiction in criminal, admiralty, and common law suits, that the two last cannot be so confounded as to place both of them under the seventh amendment of the constitution, which is,—“In suits at common law, where the value in controversy shall exceed

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twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined, in any court of the United States, than according to the rules of the common law."

As to the merits of this case, as they are disclosed by the evidence, we think that the Luda was run down, whilst she was in the accustomed channel of upward navigation, by the De Soto, being \*out of that for which she should have been steered to make the port to which she was bound. [\*465 It is a fault which makes the defendants answerable for the losses sustained from the collision. That loss will not be more than compensated by the decree of the Circuit Court. We shall direct the decree to be affirmed.

There is a point in this case still untouched by us, which we will now decide. The libellants claim a recovery, independently of all the other evidence in the case, upon the single fact disclosed by it, that the collision happened whilst the De Soto was navigating the river at night without such signal lights as are required by the tenth section of the act of the 7th of July, 1838 (5 Stat. at L., 304). It is entitled, "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam." The tenth section of it declares,—“It shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.” This section, and the other provisions of the act, except as it has been changed by the act of 1843 (5 Stat. at L., 626), apply to all steamers, whatever waters they may be navigated upon, within the United States or upon the coast of the same, between any of its ports. Signal lights at night are a proper precaution conducing to the safety of persons and property. The neglect of it, or of any other requirement of the statute, subjects the masters and owners of steamboats to a penalty of two hundred dollars, which may be recovered by suit or indictment (§ 11). But, besides the penalty, if such neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it would throw upon the master and owner of a steamboat by whom the law has been disregarded the burden of proof, to show that the injury done was not the consequence of it.<sup>1</sup>

It is said, in this case, that the De Soto had not signal lights. Whether this be so or not, we do not determine; but

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<sup>1</sup> CITED. *The City of Washington*, 2 Otto, 38.

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it is certain, from some cause or other, that they were not seen by those navigating the Luda. If they had been, it is not improbable that the collision would have been avoided. We do not put our decision of this case, however, upon this ground, but we do say, if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it.<sup>1</sup>

The act of July 7th, 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States.

\*466] \*Mr. Justice CATRON.

The question here is, how far the judicial powers of the District Courts extend in cases of admiralty and maritime jurisdiction, as conferred by the constitution. With cases of prize, and cases growing out of the revenue laws, we have no concern at present. These depend on the general power conferred on the judiciary to try all cases arising under the laws of the United States. It is only with the extent of powers possessed by the District Courts, acting as instance courts of admiralty, we are dealing. The act of 1789 gives the entire constitutional power to determine "all civil causes of admiralty and maritime jurisdiction," leaving the courts to ascertain its limits, as cases may arise. And the precise case here is, whether jurisdiction exists to try a case of collision taking place on the Mississippi river, on fresh water slightly influenced by the pressure of tide from the ocean, but within the body of the State of Louisiana, and between vessels propelled by steam, and navigating that river only. It is an extreme case; still, its decision either way must govern all others taking place in the bays, harbours, inlets, and rivers of the United States where the tide flows; as the rule is, that locality gives jurisdiction in cases of collision, and that it exists if the influence of the tide is at all felt (2 Bro. Civil & Adm. Law, 110; 7 Pet., 343). Where this collision occurred, the influence of the tide was felt.

We have, then, presented, simply and broadly, the question whether the District Courts, when acting as instance courts of admiralty, have power to try any case of collision occurring in the body of a county of any State.

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<sup>1</sup> APPLIED. *The Excelsior*, 12 Fed. Rep., 203.

In Great Britain, in 1776, when our separation from that country took place, the common law courts issued writs of prohibition to the Court of Admiralty, restraining the exercise of this jurisdiction in cases of collision taking place on rivers within the flow of tide, and within the body of an English county; but the admiralty has continued at times to exercise the jurisdiction, nor do I think the validity of such a decree could be called in question, because of the want of power. In the British colonies on this continent, and elsewhere, the jurisdiction to proceed *in rem* (in such a case) has been undisputed, so far as I can ascertain, and a cause of collision in the instance court of admiralty is peculiarly a suit *in rem*, commencing with the arrest of the ship. Abb. Ship., 233.

I agree with my dissenting brethren, that the constitution of the United States is an instrument and plan of government founded in the common law, and that to common law terms and principles we must refer for a true understanding of it, as a general rule having few exceptions; and so, also, to the common law modes of proceeding in the exercise of the judicial power we must refer as a general rule covering the whole ground of remedial justice to be administered by the national courts. To this there are two \*prominent [\*467 exceptions; first, the trial of cases in equity; and, secondly, of cases of admiralty and maritime jurisdiction. These may be tried according to the forms of the English chancery court, or the English admiralty court, and without the intervention of a jury. In chancery, the true limit of judicial power is prescribed by the sixteenth section of the Judiciary Act of 1789. The equity powers begin where the common law powers end, in affording an adequate remedy. So, in cases arising in bodies of counties (where the common law prevails) that would be cognizable in the admiralty had the cause of action arisen on the ocean, the English rule has been equally stringent in maintaining the common law remedies where they could afford plain and adequate relief. And I think the case before us must be tested by the foregoing principles. The proceeding is against the vessel, which the decree condemns; the case is the same as on a bottomry bond enforced against the vessel, or of a mortgage enforced in chancery. In neither case have the common law courts any power to afford relief, by enforcing the lien on the thing; still, the remedy at law, in case of the mortgage or the collision, is open to the injured party to proceed against the person; that is, of the debtor in the one case, and against the trespasser in the other. By the maritime law, the vessel

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doing the injury is liable *in rem* for the tort; this is the right, and the remedy must be found somewhere. Chancery has no power to interfere, nor have the common law courts any power to seize the vessel and condemn her; and it seems to me to be a strange anomaly, that where no other court can afford the particular relief, in a case confessedly within the admiralty jurisdiction if occurring on the ocean, that the power did not exist because the trespass took place in the body of a State and county.

I have thus briefly stated my reasons for sustaining admiralty jurisdiction in this instance, because of the divided opinions of the judges on the question; and because I do not intend to be committed to any views beyond those arising on the precise case before the court. I therefore concur that the jurisdiction exists. The facts in my judgment authorize the affirmance of the decree below.

WOODBURY, J., dissenting.<sup>1</sup>

It is important to notice in the outset some unusual features in this case. The Supreme Court is called upon to try the facts as well as the law in it, and to decide them between parties in interest who belong to the same State, and as to a transaction which happened, not on the high seas, as is usual in torts under admiralty jurisdiction, but two hundred miles above the mouth of the Mississippi river, within the limits of a county, and in the heart of the State of Louisiana. A question of jurisdiction, therefore, arises in this, which is \*468] very important, and must first be disposed of. It involves the trial by jury as to trespasses of every kind happening between the ocean and the head of tide-waters in all the numerous rivers of the United States, as well as the rights of the citizens near them, in such disputes with their neighbours, to be tried by their own local tribunals and their own laws, rather than be subject to the great inconvenience and expense of coming hither, at such a distance, and under a different code to vindicate their just claims. These interesting considerations in the case, and my differing in opinion on them from the majority of the court, will, it is hoped, prove a sufficient apology for justifying that difference in some detail.

A great principle at the foundation of our political system applies strongly to the present case, and is, that, while supporting all the powers clearly granted to the general government, we ought to forbear interfering with what has been

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<sup>1</sup> See *Newton v. Stebbins*, 10 How., 608.

reserved to the States, and, in cases of doubt, to follow where that principle leads, unless prevented by the overruling authority of high judicial decisions. So, under the influence of kindred considerations, in case of supposed improvements or increased convenience by changes of the law, it is an imperative duty on us to let them be made by representatives of the people and the States, through acts of Congress, rather than by judicial legislation. Paine, 75. Starting with these views, then, what is the character of the adjudged cases on the facts here to which they are to be applied?

Those to be found on the subject of torts through the collision of vessels are mostly of English origin, coming from a nation which is not only the source of much of our own jurisprudence, but entitled by her vast commerce to great respect in all matters of maritime usage and admiralty law. No principle appears to be better settled there than that the court of admiralty has not jurisdiction over torts, whether to person or property, unless committed on the high seas, and out of the limits of a county. 3 Bl. Com., 106; 4 Inst., 134; Doug., 13; 2 East, Crown Law, 803; Bac. Abr., *Courts of Admiralty*, A; 5 Rob. Adm., 345; Fitzh. Abr., 192, 416; 2 Dods., 83; 4 Rob. Adm., 60, 73; 2 Bro. Civ. & Ad. Law, 110, 204; 2 Hagg. Adm., 398; 3 T. R., 315; 3 Hagg. Adm., 283, 369; 4 Inst., 136; *Chamberlain et al v. Chandler*, 3 Mason, 244. This is not a doctrine which has grown up there since the adoption of our constitution, nor one obsolete and lost in the mist of antiquity; but it is laid down in two acts of Parliament as early as the fourteenth century, and has been adhered to uniformly since, except where modified within a few years by express statutes. *The Public Opinion*, 2 Hagg. Adm., 398; 6 Dane, Abr., 341.

The first of these acts, the thirteenth of Richard II., declared that the admiralty must "not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea." 3 Hagg. Adm., 282; 1 Stat. at L., 419. Then, in two years after, \*to remove any doubts as to what was meant by the *realm* and the *sea*, came the fifteenth of Richard II., ordering, that of "things done within the bodies of counties, by land or water, the admirals shall have no cognizance, but they shall be tried by the law of the land." 2 Pickering's Statutes, 841. This gave to the common law courts there, and forbade to the admiralty, the trial of all collisions between vessels when not on the high seas, and not out of the body of a county, though on waters navigable and salt, and where strong tides ebbed and flowed. 2 Hagg. Adm., 398; Selden on Dominion of the Sea, B. 2, ch. 14.

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And it did this originally, and continued to do it, not only down to the eighteenth century, but to our Revolution, and long since; because it was necessary to secure the highly prized trial by jury, rather than by a single judge, for every thing happening where a jury could be had from the vicinage of the occurrence within a county, and because it secured a decision on their rights by the highly prized common law, inherited from their fathers, and with which they were familiar, rather than by the civil law or any other foreign code, attempted to be forced upon the commons and barons by Norman conquerors or their partisans.

Among the cases in point as to this, both long before and since our Revolution, one of them, *Velthasen v. Ormaley*, 3 T. R., 315, happened in A. D., 1789, the very year the constitution was adopted. See also *Violet v. Blague*, Cro. Jac., 514; 2 Hagg. Adm., 398; 4 Inst., 134-138; 6 Dane, Abr., 341, *Prohibition*. And one of the most strenuous advocates for admiralty jurisdiction in Great Britain admits, that for damages done by the collision of ships, "if done at sea, remedy can be had in the admiralty, but not if it happen within the body of a county." 2 Bro. Civ. & Adm. Law, 111.

Since then, on his complaint, an express statute has been passed, 1 and 2 George IV., ch. 75, § 32, that any damage done by a foreign ship, "in any harbour, port, river, or creek," may be prosecuted either in admiralty or common law courts. *The Christiana*, 2 Hagg. Adm., 184; 38 British Stat., ch. 274. And, later still, a like change is considered by some to be made concerning injuries by domestic ships, under the 4 and 5 Victoria, ch. 45. See in the Stat. at L. But till these statutes, not a case of this kind can probably be found sustained in admiralty, even on the river Thames, at any place within the body of a county, though yearly covered with a large portion of the navigation of the world. See cases before cited, and 1 Dods., 468; 1 W. Rob., 47, 131, 182, 316, 371, 391, 474; Curtis, Adm., tit. *Collision*.

Nor is this a peculiarity in the admiralty system of that country confined to torts alone. But the same rule prevails as to crimes, and has always been adhered to, with a single exception, originally made in the statute itself of Richard, as to murder and mayhem committed in great vessels in the great rivers below the first bridges. \*Com. Dig., *Admiralty*, E, 5, note; Hale's History of Common Law, 35; 3 Rob. Adm., 336; 4 Inst., 148; 1 Hawk. P. C., ch. 37, § 36; Palmer's Practice in House of Lords, 371, note.

The next inquiry is, if this distinction, confining the jurisdiction in admiralty over torts to such as happen on the high



seas without the limits of a county, rested on such important principles as to be adopted in this country? Some seem disposed to believe it of so little consequence as hardly to have been worth attention. But this is a great mistake. The controversy was not in England, and is not here, a mere struggle between salt and fresh water,—sea and lake,—tide and ordinary current,—within a county and without,—as a technical matter only.

But there are imbedded beneath the surface three great questions of principle in connection with these topics, which possess the gravest constitutional character. And they can hardly be regarded as of little consequence here, and assuredly not less than they possessed abroad, where they involve, (1.) the abolition of the trial by jury over large tracts of country, (2.) the substitution there of the civil law and its forms for the common law and statutes of the States, (3.) and the encroachment widely on the jurisdiction of the tribunals of the State over disputes happening there between its own citizens.

Without intending to enter with any minuteness into the origin and history of admiralty jurisdiction abroad, it will be sufficient, in order to illustrate the vital importance of this question of locality, to say that the trial by jury and the common law, so ardently adhered to by the Anglo-Saxons, was soon encroached on after the Conquest by the Norman admirals claiming jurisdiction over certain maritime matters, not only on the ocean, and trying them without a jury, and on principles of their favorite civil law, but on the waters within the body of a county, and where a jury could easily be summoned, and where the principles of the common law had ever in England been accustomed to prevail. A struggle therefore, of course, soon sprung up in respect to this, as their monarchs had begun to organize an admiral's court within a century after the Conquest, but without any act of Parliament now found to vindicate it. See the Stat. at L., and 3 Reeves's Hist. of the English Law, 197. And laying down some regulations as to its powers by ordinances, as at Hastings, under Edward the First, but not by any acts of Parliament consulting the wishes of the barons and the commons. Whether this was constitutional or not, it was sufficient to make them look on the admiralty as a foreign and odious interloper. Reeves says (3 Reeves's Hist. of English Law, 187),—"The office of admiral is considered by the French as a piece of state invented by them." And whether it was imported thence by the conquerors, or originated with the Rhodians, or Romans, or Saracens, rather than the French

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\*471] or English, its principles seem to \*have been transplanted to Western Europe from the Mediterranean, the cradle of commerce for all but the Asiatic world; and it was regarded by the commons and barons of England as an intruder into that realm, and without the sanction of Parliament.

In the course of a few years, that same sturdy spirit, which in Magna Charta was unwilling to let the laws of England be changed for a foreign code, proceeded, by the 13th and 15th of Richard II., to denounce and forbid the encroachments of the admirals, and their new forms and code of the civil law, into the bodies of counties and the local business of the realm. It produced those two memorable acts of Parliament, never since departed from in torts or crimes except under express statutes, and fixing the limit of jurisdiction for them at the line between the counties and the high seas. And they have ever since retained it there, except as above named, from the highest principles of safety to the common law, English liberties, and the inestimable trial by jury,—principles surely no less dear in a republic than a monarchy.

If the power of the admiral was permitted to act beyond that line, it was manifestly without the apology which existed thus far on the ocean, of there being no jury to be called from the vicinage to try the case. Prynne's Animadversions, 92, 98; Fitzh. Abr., 192, 216. And if the act, by an alias and a fiction, was alleged to be done in the county, when in fact it happened at a distance, on the seas, the jury would be less useful, not in truth residing near the place of the occurrence, not acquainted with the parties or witnesses, and the case itself not being one happening where the common law usually operated, and with which the people and the judges were familiar.

This last circumstance furnished another reason why the admiralty court was allowed there, and should be here, to continue to exercise some jurisdiction, beside their military and naval power, over the conduct of seamen and the business of navigation when foreign. Because such matters were connected with the ocean, with foreign intercourse, foreign laws, and foreign people, and it was desirable to have the law as to them uniform, and administered by those possessing some practical acquaintance with such subjects, they being, in short, matters extra-territorial, international, and peculiar in some degree to the great highway of nations. It is when thus confined to that great highway and its concerns, that admiralty law deserves the just tribute sometimes paid to it

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of expansive wisdom and elevated equity.\*<sup>1</sup> Then only there is an excellence in such regulations as to navigation over those for rights and duties on land; the last being often more for a single people, and their limited territory, while the former are on most matters more expanded, more liberal,—the gathered wisdom of and for \*all maritime ages [\*472 and nations. They are also what has been approved by all rather than a few, and for the territory of all in common. And hence that beautiful tribute paid to them by Antoninus, and just as beautiful, that he was “lord of the world, but Law the lord of the sea.” 2 Bro. Civ. & Adm. Law, 38.

The sea being common to all nations, its police and the rights and duties on it should be governed mainly by one code, known to all, and worthy to be respected and enforced by all. This, it will be seen, indicates in letters of strong light the very line of boundary which we have been attempting to draw, on grounds of deep principle, here as well as in England. It is the line between State territory and State laws on the one hand, and the ocean, the territory of all nations, and the laws of all nations, the admiralty and sea laws of all nations, on the other hand, leaving with those, for instance, residing within local jurisdictions, and doing business there, the local laws and local tribunals, but with those whose home and business are on the ocean the forms and laws and tribunals which are more familiar to them. This line being thus a certain and fixed one, and resting on sound principles, has in England withstood the shock of ages. It is true, that some modifications have been recently made there, but only by express statutes, and carefully guarded so as not to innovate on the common law and the trial by jury. That this line of distinction was in fact appreciated quite as highly here as in England is shown by various circumstances that need not be repeated; but among them were solemn resolutions of the old Congress against acts concerning trade and revenue, extending the power of admiralty courts beyond their ancient limits, and thus taking away the trial by jury. 1 Journal, 19, 20. And as a striking evidence of the dangerous importance attached to this outrage, it was remarked in the convention of North Carolina, that “the Stamp Act and the taking away of the trial by jury were the principal causes of resistance to Great Britain.” 4 Elliot’s Deb., 157.

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\* And the vice-admiral is hence quaintly called “the justice of the peace for the sea,” by Sir Leoline Jenkins; but who ever supposed him the justice of the peace two hundred miles inward from the sea?

<sup>1</sup> CITED. *The Passenger Cases*, 7 How., 523, 537, 557.

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Indeed, this same jealousy of the civil law, and its mode of proceeding without a jury, led, in the first legislation by Congress, to forbid going into chancery at all, if relief at law is as ample and appropriate. See sixteenth section of Judiciary Act, 1 Stat. at L., 83. So as to admiralty, a statute of Pennsylvania, passed during the Revolution, allowed it only in cases "not cognizable at common law." 1 Dall., 106. And our fathers never could have meant, that parties, for matters happening within a county or State, should be dragged into admiralty any more than equity, if as full a remedy, and of as good a kind, existed in courts of law, where they could enjoy their favorite code and mode of trial. 1 Baldw., 405. This would leave much to admiralty still, as well as to equity, and more especially in the former, by proceedings *in rem*. And when it became convenient to vest additional power in the same court, or power over a wider range of territory, as \*473] it \*might in the progress of society and business, it could be done here by express statute, as it has been in respect to the Lakes, under the power to regulate commerce, and allowing a trial by jury if desired.

In short, instead of less, much additional importance should be attached to this line of distinction here, beyond what exists in England; because it involves here not only all the important consequences it does there, but some which are new and peculiar. Instead of being, as it once was there, a contest between courts of one and the same government, it may become here a struggle for jurisdiction between courts of the States and courts of the United States, always delicate, and frequently endangering the harmony of our political system. And while the result there, in favor of the admiralty, would cause no additional inconvenience and expense, as all the courts sit in one city, such a result here compels the parties to travel beyond their own counties or States, and in case of appeal to come hither, a distance sometimes of a thousand or fifteen hundred miles.

Admitting, then, as we must, that the doctrine I have laid down as to torts was the established law in England at our Revolution, and was not a mere technical doctrine, but rested on great principles, dear to the subject and his rights and liberties, should it not be considered as the guide here, except where altered, if at all, by our colonial laws or constitutions, or acts of Congress, or analogies which are binding, or something in it entirely unsuitable to our condition? The best authorities require that it should be. 1 Pet. Adm., 116, 236, N.; 1 Pet. C. C., 104, 111-114; 1 Paine, 111; 2 Gall., 398, 471; 3 Mason, 27; *Bemis v. The Janus et al.*, 1

Baldw., 545; 12 Wheat., 638; 1 Kent, Com., 377; 4 Dall., 429; 4 Wash. C. C., 213. Yet this is contested in the present case.

Some argue that the constitution, by extending the judicial power to "all cases of admiralty and maritime jurisdiction," meant cases different from those recognized in England as belonging to the admiralty at the Revolution, or those as modified by ourselves when colonies. These jurists stand prominent, and their views seem to-day adopted by a portion of this court. See the argument in *De Lovio v. Boit*, 2 Gall., 398.

The authorities which I have cited against this position seem to me overwhelming in number and strength; and some of them come from those either engaged in making the constitution, or in construing it in the earliest stages of its operation. Let me ask, What books had we for admiralty law, then, as well as common law,—both referred to in the constitution,—but almost exclusively English ones? What had the profession here been educated to administer,—English or French admiralty? Surely the former. The judges here were English, the colonies English, and appeals, in all cases on the instance side of the court, lay to the English admiralty at home.

\*What "cases of admiralty," then, were most likely to be in the minds of those who incorporated those [\*474 words into the constitution?—cases in the English reports, or those in Spain, or Turkey?—cases living and daily cited and practised on both in England and here, or those in foreign and dead languages, found in the assizes of Jerusalem near the time of the Crusades?

It is inferred by some, from 6 Dane, Abr., 352, 353, that cases in admiralty are to be ascertained, not by English law at the Revolution, but by principles of "general law." And Judge Washington held, it is said, we must go to the general maritime law of the world, and not to England alone. *Dain et al. v. Sloop Severn*, 4 Haz. (Pa.) Reg., 248, in 1828. But the whole tenor of Mr. Dane's quotations and reasons, in respect to admiralty jurisdiction, is to place it on the English basis; and Judge Washington, in several instances, took it for his guide, and commended it as the legal guide. In the *United States v. Gill*, 4 Dall., 429, he says:—"But still the question recurs, Is this a case of admiralty and maritime jurisdiction within the meaning of the constitution? The words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England, from whose code and practice we derived our systems of jurisprudence,

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and, generally speaking, obtain the best glossary." See also 4 Wash. C. C., 456, 457.

Neither of these eminent jurists was ever likely to go to the laws of Continental Europe as guides, unless in cases not well settled either here or in England, and then, as in the common law courts and in chancery, they might properly search all enlightened systems of jurisprudence for suggestions and principles to aid. Chancellor Kent, also, with his accustomed modesty, yet with clearness, supporting a like doctrine with that just quoted from Judge Washington, observes,—“But I apprehend it may fairly be doubted, whether the constitution of the United States meant, by admiralty and maritime jurisdiction, any thing more than that jurisdiction which was settled and in practice in this country under the English jurisprudence when the constitution was made.” 1 Kent, Com., 377. Another strong proof that this was the opinion prevailing here at that time is, that a court of admiralty was established in Virginia, in 1779, under the recommendation of Congress to all the States to make prize courts; and, by the act of Assembly, it is expressly provided that they are to be “governed in their proceedings and decisions by the regulations of the Congress of the United States of America, by the acts of the General Assembly, by the laws of Oleron, and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and nations.” 10 Hening’s Stat., 98. They thus, after our own laws, State and national, made England the guide.

It is said by others, appealing to feelings of national pride, that we are to look to our own constitution and laws, and \*475] not to \*England, for a guide. So we do look to our own laws and constitution first, and when they are silent go elsewhere. But what are our own laws and constitution, unless those in England before our Revolution, except so far as altered here, either before, or then, or since, and except such in England then as were not applicable to our condition and form of government? This was the guide adopted by this court in its practice as early as August 8th, 1791 (1 How., 24), and as late as January, 1842, it treated the practice in England as the rule in equity, where not otherwise directed; and in *Gaines et al. v. Relf et al.*, 15 Pet., 9, it decided that when our own “rules do not apply, the practice of the Circuit and District Courts must be regulated by the practice of the court of chancery in England.” See, also, *Vattier v. Hinde*, 7 Pet., 274. And most of its forms and rules in admiralty have been adopted in our Dis-

strict and Circuit Courts. See Rule XC., in 1 How., 66, Pref. And this court has again and again disposed of important admiralty questions, looking to England alone, rather than the Continent, as a guide when they differed.

Thus the Continental law would carry admiralty jurisdiction over all navigable streams. Yet this court has deliberately refused to do it, in *The Thomas Jefferson*, 10 Wheat., 428. Had it not so refused, in repeated instances, there would have been no necessity for the recent act of Congress as to the Lakes and their tributaries. So, the civil law gives a lien for repairs of domestic ships; but this court has not felt justified in doing it without a statute, because not done in England. 7 Pet., 324. And in *Hobart v. Drogan et al.*, 10 Id., 122, this court felt bound to follow the English decisions as to salvage, though in some respects harsh. See, also, 3 How., 568.

So, when the constitution and the acts of Congress speak, as they do in several instances, of the "common law," do they not mean the English common law? This court so decided in *Robinson v. Campbell*, 3 Wheat., 223, adhering, it said, "to the principles of common law and equity, as distinguished and defined in that country, from which we derive our knowledge of those principles." Why not, then, mean the English admiralty law when they speak of "cases of admiralty and maritime jurisdiction"? They of course must, by all analogous decisions and by established usage, as well as by the opinions of eminent jurists. The English decisions furnish, also, the most natural, appropriate, uniform, and well-known principles, both for action and judicial decision.

It would be extraordinary, indeed, for this court to undertake to exercise a legislative power as to this point, and without warrant to search the world over and select, for the trial of private rights, any law they may prefer. On the contrary, its duty rather is to declare the law which has already become ours, which we inherited from our ancestors or have enacted ourselves, and which is not vagrant \*and uncertain, but to be found in our own judicial history and institutions, our own constitution, acts of [\*476 Congress, and binding precedents. Congress also might, in many instances, perhaps, make the law better than it is, and mould it so as to meet new exigencies in society, and suit different stages of business and civilization; and, by new laws as to navigable waters, judicial tribunals, and various other matters, is yearly doing this. But does this court possess that legislative power? And if Congress chooses to give additional jurisdiction to the District Court on the Lakes, or

tide-waters, or navigable streams between them, and allow jury trials when desired, under its power to regulate commerce and collect a revenue, will this not answer every valuable purpose, and supply any new want or fancied improvement in a more satisfactory and more constitutional manner than for courts to do it without consulting Congress?

That Congress possess the power to do this cannot be plausibly questioned. The late law as to jurisdiction over the Lakes, which is given to the District Court, but not as an admiralty case under the constitution, and with a jury when desired, is a strong illustration of legislative opinion being the way we contend.

Any expansion or enlargement can be thus made, and by withdrawing in part the jurisdiction now conferred on the District Courts in any matters in admiralty, Congress can also abridge the exercise of it as experience and time may show to be wise. For this reason, we are unable to see the force of the argument just offered by four members of this court, that if the English admiralty law was referred to in the expression of "all cases of admiralty and maritime jurisdiction," no change in it could be made, without being at the trouble and expense of altering the constitution.

But in further answer to this, let me ask if the constitution, as they contend, was meant to include cases in admiralty as on the Continent of Europe rather than in England, could the law as to them be more easily altered than if it was only the law of England? And would it not take the interpretation of the admiralty law as much from the courts in one case as in the other?

It is conceded, next, that legislation has, in some respects, in England, since 1789, changed and improved her admiralty proceedings; but this only furnishes additional evidence that the law was different when our constitution was framed, and that these changes, when useful and made at all, should be made by legislation and not by judicial construction, and they can rightfully have no force here till so made. *United States v. Paul*, 6 Pet., 141. The difference, too, between a change by Congress and by this court alone is, furthermore, that the former, when making it, can and doubtless will allow a trial by jury, while we are unable to do this, if we make the change by construing the case to be one legitimately of admiralty jurisdiction.

Finally, then, the law, as it existed in England at the time \*477] of the \*Revolution, as to admiralty jurisdiction over torts, is the only certain and safe guide, unless it has been clearly changed in this respect, either by the constitu-



tion, or acts of Congress, or some colonial authority. We have already seen that the constitution has not used words which are fairly open to the idea that any such change was intended. Nor has it made any alteration in terms as to torts. And no act of Congress has introduced any change in respect to torts, having in this respect merely conferred on the District Courts cognizance of "all civil cases" in admiralty, without in a single instance defining what shall be such cases in connection with torts. The next inquiry, then, is, whether the colonies changed the law as to the locality of torts, and exercised jurisdiction over them in admiralty, though committed within a county and not on the high seas.

I am compelled to go into these details more than would otherwise be done, considering their tediousness, on account of the great reliance on them in one of the opinions just read. In order to operate on the point under consideration, it will be seen that any colonial change must have been so clear and universal as to have been referred to in the constitution and the act of Congress of 1789, and to be the meaning intended by their makers to be embraced in the expression of "cases of admiralty and maritime jurisdiction," rather than the meaning that had usually been attached to them by the English language and the judicial tribunals of England, for centuries. And this change, likewise, must have been clearly meant to be referred to and adopted, notwithstanding its great encroachment in torts on the boasted trial by jury, and which encroachment they were denouncing as tyranny in other cases, and notwithstanding its natural consequences would be new collisions with the powers of the State tribunals, which they were most anxious to avoid. I have searched in vain to find acts of assembly in any of the thirteen colonies, before 1776, making such a change, much less in a majority or all of them. Nor can I find any such judicial decisions by vice-admiralty courts in any of them, much less in all. Nor is it pretended that any acts of Parliament or judgments in the courts in England had prescribed a different rule in torts for the colonies from what prevailed at home.

It would be difficult, then, to show that a law had become changed in any free country, except by evidence contained in its legislation, or constitutions, or judicial decisions. But some persons, and among them a portion of this bench, have referred to commissions of office to vice-admirals as evidence of a change here; and some, it is feared, have been misled by them. 1 Kent, Com., 367, *n.*; 2 Gall., 378.

These commissions, in the largest view, only indicated what *might* be done, not what was actually afterwards done under

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them. In the next place, all must see, on reflection, that a commission issued by the king could not repeal or alter the established laws of the land.

\*478] \*Beside the forms of some of these commissions, referred to in *De Lovio v. Boit* (2 Gall., 398), an entire copy of one of them is in Stokes, and another in Duponceau on Jurisdiction, p. 158, and in Woodcock's Laws of the British Colonies, p. 66. It will be seen that they are much alike, and though there are expressions in them broad enough to cover all "fresh waters" and "rivers," and even "banks of any of the same" (Woodcock, 69), yet tide-waters are never named as the limit of jurisdiction; and, over and paramount to the whole, the judge is required to keep and cause to be executed there "the rights, statutes, laws, ordinances, and customs anciently observed." Where anciently observed? In England, of course; and thus, of course, were to comply with the English statutes and decisions as to admiralty matters.

This limitation is inserted several times, from abundant caution, in the commission in Woodcock, 66, 67, 69.

But beside these conflicting features in different parts of them, the commissions of vice-admirals here seem, in most respects, copies of mere forms of ancient date in England (Woodcock's Brit. Col., 123), and, of course, were never intended to be used in the colonies as alterations of the laws, and were, as all know, void and obsolete in England when differing from positive statutes. So virtually it was held in the colonies themselves. *The Litte Joe*, Stew. Adm., 405; and *The Apollo*, 1 Hagg. Adm., 312; Woodcock's Laws and Const. of the Colonies, 123. These commissions, also, if they prove any thing here actually done different from the laws in England, except what was made different by express statute, as to matters connected with breaches of the laws of revenue and trade, and not as to torts, prove quite too much, as they go above tide-water and even on the land.

But it is not believed that they led to any practices under them here different from the laws at home in respect to torts. None can now be found stated, either in reports of cases or contemporaneous history. Probably in the colonies the same rules as at home prevailed on this, for another reason; because no statute was passed as to torts here, and appeals to the admiralty at home existed, on the instance side of the court, till a recent change, so as to preserve uniformity in the colonies and at home. *Bains v. The James*, Baldw., 549; Woodcock, 242. A case of one of those appeals is reported in 2 Rob. Adm., 248, 249, *The Fabius*. There the enlarged

powers conferred on vice-admiralty courts by the 6 and 7 of William III., as to seizures and prosecutions for breaches of the laws of trade and revenue, are not, as I understand the case, considered admiralty powers, and we all know they were not so *per se* or *proprio vigore*. A looser practice in the colonies, but no difference of principle, except under statute, appears to have been tolerated. Woodcock's Laws, &c., 273.

In accordance with this, Tucker, in his Appendix to Part I. \*of 1 B. Com., 432, after a careful examination of charters and other documents, comes to the conclusion, that [\*479 the laws at home before emigration, both statute and common law, so far as applicable to the condition of the colonies, and in favor of life, liberty, and property of the subject, "remained in full force therein until repealed, altered, or amended by the legislative authority of the colonies respectively, or by the constitutional acts of the same when they became sovereign and independent states." See, also, to this effect, *Montgomery v. Henry*, 1 Dall., 49; 1 Chalmers's Op., 195; Woodcock, 156. But what seems to settle this inquiry is the treatise of a colonial judge, giving some data on this very subject, and of course well informed on the subject. Stokes's View of Constitution of British Colonies (p. 270) contains an account of the admiralty jurisdiction in the colonies before the Revolution.

Two things are clearly to be inferred from him:—1st. That admiralty and maritime cases extended only to matters "arising on the high seas"; and, 2d. That the practice and rules of decision in admiralty were the same here as in England.

Thus, in chapter 13, page 271, he says:—"In the first place, as to the jurisdiction exercised in the court of vice-admiralty in the colonies, in deciding all maritime causes, or causes arising on the high seas, I have only to observe, that it proceeds in the same manner that the High Court of Admiralty in England does." "The only book that I have met with, which treats of the practice of the High Court of Admiralty in England, is Clarke's Praxis Admiralitatis, and this is the book used by the practitioners in the colonies."\*

\* Woodcock on the British Colonies is equally explicit, that the vice-admiralty courts in the colonies were called so because in fact subordinate to the admiralty at home, and with like jurisdiction, except where altered by positive statute. Thus, speaking of "the jurisdiction of the admiralty over subjects of maritime contract," he says,—“With respect to this authority it may be only necessary to observe, that in such matters the admiralty court in the colonies holds plea agreeably to the course of the same court in England.” (p. 272.)

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In connection with this, all the admiralty reports we have of cases before the Revolution, and of cases between 1776 and 1789, seem to corroborate the same view, and are worth more to show the actual jurisdiction here than hundreds of old commissions containing obsolete powers never enforced. There is a manuscript volume of Auchmuty's decisions made in the vice-admiralty court in Massachusetts, about 1740. (See Curtis's Merchant Seamen, 348, note.) It will be difficult to find in them, even in one colony, much more in the thirteen, clear evidence of any change here, before the Revolution, in respect to the law concerning the locality of torts.

The very first case of *Quitteville v. Woodbury*, April 15, 1740, is a libel for a trespass. But it is carefully averred to have taken place "at the Bay of Honduras, upon the open sea, on board the ship King George."

\*480] "No other case of tort is printed, and on a careful examination of what has not been printed no case is found varying the principle. There is one for conversion of a vessel and cargo, July 30th, 1742, tried before George Cradock, deputy judge in admiralty, *Farrington v. Dennis*. But the conversion happened on the high seas, or what in those days was often termed the "*deep sea*." So a decision in the State of Delaware, in 1788, reported in the Introduction to 4 Dall., 2 (last edit.); the judge seems to concede it to be law in that colony, that all cases, except prize ones, must happen "on the high seas" in order to give the admiralty jurisdiction over them.

So a few cases before the adoption of the constitution are reported in Bee's Admiralty Decisions, though they are mostly on contracts. But they all make a merit of conforming to the course in the English admiralty, rather than exhibiting departures from and enlargements of its jurisdiction. See one in A. D., 1781, Bee's Adm., 425, and another in the same year (p. 419), and another in 1785 (p. 369). But the most decisive of all is a case in A. D., 1780, in the High Court of Appeals in Pennsylvania, *Montgomery v. Henry et al.*, 1 Dall., 49.

It was a proceeding in admiralty, regarded by some as sounding in tort, and by some in contract; but as to the line of jurisdiction, this having happened, as averred, on the river Delaware, the court say, through Reed, their president,—“But it appears to us, that from the 13th and 15th Richard II. the admiralty has had jurisdiction on all waters out of the body of the county. There has been great debate as to what is meant by high seas. A road, haven, or even river, not within the body of the county, is high sea in the idea of civilians.

Therefore, if the river Delaware is out of the body of any county, we think it clear that it is within the admiralty jurisdiction."

In short, as to this matter the first principles of English jurisprudence, as applicable to her colonies, show that there could be no difference here on a matter of this kind, unless authorized by express statute at home, extending to the colonies, or by acts of assembly here, expressly sanctioned at home.

Blackstone says,—“For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.” 1 Bl. Com., 108; 2 P. Wms., 75. Exceptions of course exist as to matters not applicable to their condition, but none of them reach this case, and require consideration.

Were not we then British colonies, and beginning here in an uninhabited country, or, what is equivalent, tenanted by a people not having any civilized laws? Why, then, were not the principles of English admiralty law in force here in the vice-admiralty courts, as \*much as the English common law in other courts,—and which has been declared by [\*481 this tribunal to have been the basis of the jurisprudence of all the States in 1789? 3 Pet., 444. Indeed, any laws in the plantations contrary to or repugnant to English laws were held to be void, if not allowed by Parliament at home. 3 Bl. Com., 109, App., 380, by Tucker.

What is left, then, for the idea to rest on of a change in respect to the locality of torts here, to give admiralty courts jurisdiction over them different from what existed in England in 1776? We have already seen that there is nothing in the constitution, nothing in any acts of Congress, nothing in any colonial laws, or colonial decisions in the vice-admiralty courts. Some venture to infer it merely from analogies. But denying the competency for courts of limited jurisdiction, like ours, to do this, if impairing jury trials and encroaching on State jurisdictions, without any express grant or authority to that effect, let me ask, what are the analogies? The only ones which can be imagined are cases of crimes, contracts, and seizures for breaches of laws of revenue and trade. But the decisions as to crimes prove directly the reverse.

In respect to them, no change whatever on this point has occurred, and the rule recognized in this country as the true one concerning their locality is, like that in England, if tried in admiralty as being crimes by admiralty law, they must have been committed without the limits of a county or State. 4

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Mason, 308; 5 Id., 290; 1 Dall., 49; 3 Wheat., 336, 371; 5 Id., 76, 379; 12 Id., 623; 4 Wash. C. C., 375; Baldw., 35.

And all crimes on the waters of the United States made punishable in the courts of the United States, by acts of Congress, with few or no exceptions, if connected solely with admiralty jurisdiction, are scrupulously required to have been committed on the sea or the high seas, "out of the jurisdiction of any particular State."

In all criminal cases in admiralty in England, the trial has also been by jury, by an express act of Parliament, ever since the 32 Henry VIII. (Com. Dig., *Admiralty*), and so far from the same principle not being considered in force here, the constitution itself, before any amendments, expressly provided for all criminal trials of every kind being by a jury. Art. 3, § 2, and Federalist, No. 81.

So, the old Confederation (Article 9th) authorized Congress to provide courts for the trial "of piracies and felonies committed on the high seas." 1 Laws (Bioren's edit.), p. 16. And when Congress did so, they thought it expedient to adopt the same mode of trial for acts "on the sea" as on the land, and "according to the course of the common law"; and under a sort of mixed commission, as under the 28 Henry VIII., to try these offences, consisting of the justices of the Supreme Court in each State, united with the admiralty judge, they imperatively required the use of a jury. 7 Journ. of Old Cong., 65; Duponceau on Juris., 94, 95, note.

\*482] \*Finding, then, that any analogy from crimes directly opposes, rather than favors, any change as to torts, let us proceed to the case of contracts. It will be necessary, before they can be allowed any effect, for their friends to show, that the locality of contracts has been changed here, and then that such change should operate on torts. Contracts, in one aspect of the subject, did not differ as to their locality from torts and crimes before Richard II. any more than after.

But as the question in relation to the locality of contracts here is still undecided, and is before this court awaiting another argument, on account of divisions of opinion among its members in respect to it, no analogy can be drawn to govern other questions from what is itself thus uncertain; and it is not deemed decorous by me to discuss here the moot question as to contracts, or, till the other action pending in relation to them is itself settled, to draw any inference from what I may suppose to be, or not to be, their locality.

Without, then, going farther into the subtilties as to the

locality or want of locality of contracts within admiralty jurisdiction, so fully discussed in 2 Gall., 475, by Judge Story, on the one hand, and in 12 Wheat., 622, by Justice Johnson, on the other, as well as in the case of *The Lexington*, at this term, it is enough to say, that is not the question now under consideration. It is, at the nearest, but collateral, and differently situated. For in trespass it was always a test, not only that it happened on the sea, instead of merely tide-water, but out of the body of a county.

And above all this, those very writers who contend that locality does not govern the jurisdiction over contracts admit that it controls, and always has controlled, the right to try both torts and crimes (with the exceptions before named, and not influencing this question), during all the fluctuations and struggles about contracts during the last four hundred years.

In the resolutions said to have been prepared by the judges in 1632, with a view to arrange differences concerning jurisdiction, no change or modification is made as to torts. Dun. Adm. Pr., 13, 14; *Bevans's case*, 3 Wheat., 365, note.

Nor was there any in the mutual arrangement between the different courts in 1575. See it, in 3 Wheat., 367, note; *Pyrnne's Animadversions*, 98, 99. And in *Crowell's Ordinance* of 1648, on the jurisdiction of the admiralty, so much relied on by those friendly to the extension of it, and by some supposed to have been copied and followed in this country, damages by one ship to another were included, but it was meant damages on the sea, being described as "damages happening thereon, or arising at sea in any way." Dun. Adm. Pr., 16.

Hence, even in admiralty writers and admiralty courts, it is laid down repeatedly, "in torts, locality ascertains the judicial powers." And again, "in all matters of tort, locality is the strict limit." 2 Bro. Civ. & Adm. Law, 110. So in *The Eleanor*, 6 Rob. Adm., 40, \*Lord Stowell said, "the locality is every thing," instead of holding it to be an [\*483  
obsolete or immaterial form.

Lastly, in respect to analogies in seizures for breaches of the laws of revenue and trade, it is claimed that some change has occurred there, which should influence the jurisdiction over torts. But these seizures are not for torts, nor has the change in relation to the trial of them happened on any principle applicable to torts. Moreover, it has been made as to seizures only under express statutes, and the construction put on those statutes; and if this is to be followed by analogy,

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no change can be made as to torts except by express statutes.

But there has never been any such statute as to them, and if without it the change was made by analogy, tide-waters would not be the test, as is here contended, but, like cases of seizures, any waters navigable by a boat of ten tons burden. It is even a matter of very grave doubt, whether a mistake was not committed in refusing a trial by jury in cases of seizure, under our Judiciary Act, whenever desired, or at least whenever not made on the high seas. Kent, Dane, and several others, think the early decisions made on this, and which have since been merely copied, were probably erroneous. 1 Kent, Com., 376; 6 Dane, 357.

So thought Congress, likewise, when, Feb. 13th, 1801 (sec. 11th), it conferred on the Circuit Court jurisdiction over "all seizures on land or water, and all penalties and forfeitures made, arising, or accruing under the laws of the United States." This was original cognizance, though not in a court of admiralty, and properly treated seizures on water as on land, and to be all of course tried by a jury. 2 Stat. at L., 92. This was a change made by Congress itself, aided by some of the first lawyers in the country. But as the whole statute was repealed, on account of the obnoxious circumstances as to the judges under which it was passed, all the changes fell with it.

The admiralty in England did not exercise any jurisdiction over seizures for revenue, though on the ocean. 8 Wheat., 396, note. But it was in the court of exchequer, and was devolved on admiralty courts in the colonies for convenience, as no court of exchequer existed there. Duponceau's Jurisdiction, 139, and note. This additional jurisdiction, however, was not an admiralty one, and ought to have been used with a jury, if desired, as in the exchequer. Powers not admiralty are for convenience still devolved on admiralty courts; and it was a great grievance, complained of by our ancestors here, that such a trial was not allowed in such cases before the Revolution. Undoubtedly it was the expectation of most of those who voted for the act of 1789, that the trial by jury would not be here withheld in cases of seizures for breach of laws of the revenue, which they had always insisted on as their constitutional right as Englishmen, and, *a fortiori*, as Americans.

\*484] \*They had remonstrated early and late, and complained of this abridgment of the trial by jury even in the Declaration of Independence, and as one prominent cause and justification of the Revolution. 1 Journal of Old



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Congress, 45 ; 6 Dane, Abr., 357 ; Baldw., 551. As plenary evidence of this, it is necessary to quote here but a single document, as that was drawn up by John Jay, afterwards the chief justice of this court. It is the address by the old Congress, October 21st, 1774, to the people of Great Britain, and among other grievances says,—“It was ordained, that whenever offences should be committed in the colonies against particular acts imposing duties and restrictions upon trade, the prosecutor might bring his action for the penalties in the *courts of admiralty* ; by which means the subject lost the advantage of being tried by an honest, uninfluenced jury of the vicinage, and was subjected to the sad necessity of being judged by a single man,—a creature of the crown,—and according to the course of a law (civil) which exempts the prosecutor from the trouble of proving his accusation, and obliges the defendant either to evince his innocence or to suffer.”

Now, after these reprobations of such a practice,—after two specific amendments to the constitution to secure the trial by jury in cases before doubtful,—and after three clauses in the Judiciary Act expressly allowing it in all proper cases,—who can believe that they intended in the ninth section of that very act to use language which ought to be construed so as to deprive them entirely of a jury trial in that very class of cases where the refusal of it had long been denounced by them as oppressive, unlawful, and one of the grounds for a revolution? Should we thus brand them with duplicity, or tyranny?

As a single illustration that their views in the act of 1789 have probably been misconstrued or misapprehended, if seizures for breaches of the laws of revenue and trade were in reality “cases of admiralty and maritime jurisdiction,” as meant in the constitution, then no statute was necessary, like a clause in that of 1789, to make them so, and to make them so not at the line of tide-water, which is here contended for, but wherever a boat of twenty tons could go from the ocean. And if they were not such cases to that extent and in that manner without a statute, but were common law and exchequer cases, then it is certain a statute would not make them “admiralty cases,” but might devolve their trial on the District Court, allowing a jury, as that trial was expressly reserved by the amendment to the constitution in all common law cases. Stokes discloses the derogatory reason assigned for such a violation of our forefathers’ rights by some of the British statutes before the Revolution (Stokes on Constitution of Colonies, 860). With much *naïveté*, he

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says,—“In prosecutions in the courts of vice-admiralty in the colonies for the breach of any act of Parliament relating to the trade and revenue of the colonies, all questions as well \*485] of fact \*as of law are decided by a judge alone, without the intervention of a jury; for such was the inclination of the colonists in many provinces to carry on a contraband trade, that to try the fact of an information by a jury would be almost equivalent to the repealing of the act of Parliament on which such information was grounded. In other respects, I apprehend the proceedings should be conducted as near as may be to the practice of the Court of Exchequer in England.” And the reason said to have been assigned by Judge Chase for the construction first put on the Judiciary Act—that seizures for violation of the laws of revenue and trade were meant by Congress to be treated as cases in admiralty, and tried without a jury, though they never had been so tried in England till the encroaching statutes, and never here except as our fathers declared to be illegally—is almost as harsh, and more derogatory on our fathers themselves, as being an act done by themselves, in saying it was to avoid “the great danger to the revenue if such cases should be left to the caprice of juries.” *The United States v. Betsey*, 4 Cranch, 446, n.

Whoever could conjecture, for such a reason, that a statute was intended to have such a construction, seems to have forgotten the remonstrances of our fathers against the odious measures of England corresponding with such a construction; and to have overlooked the probable difference in the feelings of juries towards laws made by themselves or their own representatives, and those made by a Parliament in which they were not represented, and whose doings seemed often designed to oppress, rather than protect, them. And what presumption is there that an exclusion of juries from trials as to trade and revenue, for causes like these, was meant to be extended to torts?

The reason is totally inapplicable, and hence the presumption entirely fails. What a stretch of presumption without sufficient data is it to infer that this resisted case of seizures is first strong evidence of a larger jurisdiction in admiralty established here, and likely to be adopted under the constitution by those who had always ardently opposed it, and next is evidence of a larger jurisdiction in other matters; disconnected entirely with that and all the reasons ever urged in support of it?

The last inquiry on this question of jurisdiction is, What have been the decisions concerning the locality of torts in

admiralty in the courts of the United States since the constitution was adopted?

It is the uncertainty and conflict concerning these, which has in part rendered it necessary to explore with so much care how the law was here, when our present system of government went into operation.

It is a matter of surprise, on a critical examination of the books, to see upon how slight foundations this claimed departure from the \*established law in force in England [\*486 as to torts rests, when looking to precedents in this country. I do not hesitate to concede to the advocates of a change, that the doctrine has been laid down in two or three respectable compilers. Curtis on Merchant Seamen, 362; Dun. Ad. Pr., 51. But others oppose it; and we search in vain for reasons assigned anywhere in its favor. The authorities cited from the books of reports in favor of a change here are not believed, in a single instance, to be in point, while several appear to maintain a contrary doctrine.

They are sometimes mere *dicta*, as the leading case of *De Lovio v. Boit*, in 2 Gall., 467, 424, that having been a case of a contract and not a tort; or as in 1 Mason, 96, that having occurred on the high seas. So *Thomas v. Lane*, 2 Sumn., 1; Ware, 75, 96; 4 Mason, 380. Or they are cases cited, such as *Montgomery v. Henry*, 1 Dall., 49, which relate to contracts alone. (See, also, case by Judge Conkling, in New York Leg. Ob., Oct., 1846; *The Mary*, 1 Paine, 678.) Or they happened, as was averred in 1 Dall., 53, on waters out of any county. Or they are cases of seizure for breaches of the laws of trade, and navigation, and revenue, depending on express statute alone. *The Vengeance*, 3 Dall., 297; *The Betsy*, 4 Cranch, 447; *Wheelan v. The United States*, 7 Id., 112; Conkling's Pr., 350; 1 Paine, 504; Gilp., 235; 1 Wheat., 920; 8 Id., 391. And are, as before explained, probably misconstrued.

The parent of many of these mistaken references, and of the decisions as to seizures, is the case of *The Vengeance*, in 3 Dall., 297, a case which Chancellor Kent, in his Commentaries, justly says "was not sufficiently considered" (vol. 1, p. 376). It was not a case of tort, as some seem to suppose; nor even a seizure, under the act of 1789, for a breach of the laws as to revenue and trade. But it was an information for exporting arms, prohibited by a special act, passed 22d May, 1793.

Some of the references, likewise, are to cases of prize, which in England as well as here never depended on locality, like the high seas, but might be even on land, and were at first

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conferred on the admiralty courts by special commission, and were not originally a part of its permanent jurisdiction. 10 Wheat., 315; 5 Id., 120, App.; 4 Dall., 2; Doug., 613, n; 1 Kent, Com., 357. Where any of the references in the books here are to printed cases of tort, they uniformly appear to have been committed on the high seas, or without the body of a county and State. *Burke v. Trevitt*, 1 Mason, 96, 99, 360; *Manro v. The Almeida*, 10 Wheat., 474, 486, 487; *The Josefa Segunda*, Id., 315; *Thomas v. Lane*, 2 Sumn., 1; *The Appollon*, 9 Wheat., 368; *Plummer v. Webb*, 4 Mason, 380, and Ware, 75; *Steele v. Thatcher*, Id., 96. If the act happened in foreign countries, in tide-waters, there may well be jurisdiction, as being not within the body of any county \*487] here. \**Thomas v. Lane*, 2 Sumn., 9. Such was the case of *The Appollon*, 9 Wheat., 368, not being a case within tide-waters and a county in this country.

There is an expression in 12 Pet., 76, which is supposed by some to sanction a change. But it is only a *dictum*, that having been a case of crime, and the idea and the expression are, not that torts or crimes could be tried in admiralty, when committed within a county, on tide-water therein, but that in no case, if committed on land or above tide-water, could they be tried there as admiralty offences, but only as offences defined and punished by acts of Congress under the power to regulate commerce. *United States v. Coombs*, 12 Pet., 76. This may be very true, and yet in torts, as well as crimes, they may not be punishable without a statute, and as mere admiralty cases, unless committed on the ocean.

During this session I have for the first time seen a case decided in one of our circuits, which holds that the tide-waters of the Savannah river are within the jurisdiction of the admiralty, as to collisions between boats. *Bullock v. The Steamboat Lamar*, 1 West. L. J., 444. But as the learned judge seems to have taken it for granted that the question of jurisdiction had been settled by previous decisions, he does not go into an examination of its principles, and cites only one authority (7 Pet., 324), which will be found to be a case of contract and not tort. So that, with this single exception, so far as it be one, not a single reported case is found, and only one manuscript case referred to (Dunl. Adm., 51), where a tort was committed within one of our counties, though on tide-water, which was adjudged to be within admiralty jurisdiction, since the country was first settled, or of a like character in England, unless by recent statutes, for the last four centuries.

On the contrary, in Bee's Admiralty Reports and Peters's,  
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in Gilpin's and Ware's, cases for torts are found, but all arising on the high seas, unless some doubt exists as to one in the last, partly overruled afterwards in the Circuit Court. So, whatever may be the *obiter dicta*, it is the same as to all in Paine, Washington, Baldwin, and even Gallison, Mason, Sumner, and Story. Indeed, this result accords with what was rightfully to be anticipated from the rule laid down in the first elementary law-book in the hands of the profession at the time of the Revolution, that "admiralty courts" (3 Bl. Com., 106), had cognizance of what is "committed on the high seas, out of the reach of our ordinary courts of justice." And "all admiralty causes must be, therefore, causes arising wholly upon the sea, and not within the precincts of any county." 3 Bl. Com., 106.

Moreover, as to American authorities directly against these supposed changes as to torts, it is hardly possible to find any thing stronger than the absence we have just referred to, almost entire, of any attempt in actions to sustain the jurisdiction in admiralty \*over torts, unless happening on [488 the high seas, and the uniform settled decisions in England, that it exists only there. But, beside this, there is the absence likewise of any colonial statutes or colonial decisions to bring in question at all the adjudged cases at home, which governed this question here no less than there. There is next the remark by Chancellor Kent, that if tides ebb and flow in a county, a recovery cannot be had for a tort there, on the principles of the common law courts. 1 Kent, Com., 365, *n.*; 3 Hagg. Adm., 369.

And no one can read the learned Digest of Dane without seeing that in torts he considers the trial by jury proper, wherever they occur within the body of any county. 6 Dane, Abr., *Prohibition*. And it is laid down generally, in several other instances in this country, that the locality of torts must be on "the sea," in order to confer jurisdiction on the admiralty. *Thackery et al.*, Gilp., 524, 529; 3 Mason, 243; Baldw., 550-554. So in *Adams v. Haffards*, 20 Pick. (Mass.), 130. See also the colonial case before cited from 1 Dall., 53, *Montgomery v. Henry et al.*, directly in point, that the line of the county was the test, and not tide-water, unless without the county. This was in 1780, and is most conclusive proof, that no colonial enlargement of mere admiralty jurisdiction as to this matter had occurred here in practice, either under the words of commissions to vice-admiralty judges, or any difference of circumstances and condition.

But, beside this, one resolve of the old Congress shows, that they considered the line of the county as the true one;

and hence its violation in cases of trade and revenue, under statutes passed to oppress them, caused their remonstrances that the vice-admiralty courts had transgressed the ancient limits of the bodies of counties. 1 Journal of Old Cong., 21-23. How unlikely, then, is the inference from this, that the framers of the constitution regarded this encroachment as the true line, and, when protesting against it, not only meant to adopt it, but extend it to cases of torts?

It is not a little remarkable, too, that in maturer life Judge Story himself, in speaking of the jurisdiction over torts (3 Com. on Const., 1659), says,—“The jurisdiction claimed by the courts of admiralty as properly belonging to them extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea.” That means, at common law, outside of a county.

Thus says Coke, in 4 Inst., 134:—“So as it is not material whether the place be upon the waters *infra fluxum et refluxum aquæ*; but whether it be upon any water within any county.” Sea Laws, 234. Again, the ebb and flow of tide, to give jurisdiction to the admiral, means on the coast outside. Fortescue, De Laudibus L. Ang., 68, note. So in 2 Madison Papers, 799, 800, it will be seen that Judge Wilson deemed the admiralty jurisdiction to relate to what the States had not exercised power over, and to the sea. So in The Federalist, No. 80, cases arising on the high seas are said to be those embraced.

\*489] Indeed, the departure from the settled line of jurisdiction as to torts here, so far as it may have gone in theory or speculation, seems likely to have begun in mistake rather than in any old commission or adjudication, founded on any statute or any well-settled principle. It is likely to have commenced either by omitting to discriminate between torts and contracts, or between torts depending on general principles and seizures for violating laws of revenue and trade, which depended on the words of a special statute, and the construction given to those words; or from a supposed but unfounded analogy to the rules as to prizes, with which our fathers were very familiar in the Revolution, and taking cognizance of them in admiralty here, as in England, if captured anywhere, not only on tide-water or “below high-water mark,” but even on land. 4 Dall., 2; 2 Bro. Civ. & Adm. Law, 112; 5 Wheat. App., 120. Or it may have occurred, and that probably was oftenest the case, from various general expressions in the English books and cases as to the admiralty jurisdiction being coextensive with tide-waters, when that expression means, in all the adjudged

cases in England as to torts and crimes,—and must, on principle, as before shown, mean, in order to secure the trial by jury and the common law,—the tide-waters on the sea-coast, the flux and reflux of the tide, out of the body of a county.

There is a similar expression in Judge Story's Commentaries on the Constitution (vol. 3, § 1667), as to crimes, in speaking of the existence of admiralty jurisdiction over them in creeks "and bays within the ebb and flow of tide"; but he takes care to add, very properly, "at least in such as are out of the body of any county in a State." Probably the true origin of the whole error was by looking to expressions about tide-water, or the ebb and flow of tide, without noticing further that the act must be in such tide-waters as "are out of the body of any county in a State," and that this was indispensable to be observed, in order to protect the invaluable principles we have been discussing.

The power of the general government and its courts over admiralty matters was doubtless conferred on account of its supervision over foreign trade and intercourse with other nations, and not to regulate boats like these, far in the interior, and never going to any foreign territory, or even adjoining State, much less touching the ocean. Nothing can be more significant of the correctness of this limitation to matters on the ocean, than the remarks of Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall., 475, that the judicial power of the Union was extended to "cases of admiralty and maritime jurisdiction, because, as the seas are the joint property of nations, whose rights and privileges thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction."

Our forms of proceeding, also, in admiralty, and which are founded \*on substance, count usually on the transaction as having happened on "the high seas," knowing [\*490 full well that they are the great theatre and territory for the exercise of admiralty law and admiralty power; and being obliged to make such an allegation in England in order to gain jurisdiction. *Ross v. Walker*, 2 Wils., 265.

Half the personal quarrels between seamen in the coasting trade and our vast shore fisheries, and timber-men on rafts, and gundalo men, and men in flat boats, workmen in the sea-coast marshes, and half the injuries to their property, are where the tide ebbs and flows in our rivers, creeks, and ports, though not on the high seas. But they never were thought to be cases of admiralty jurisdiction when damages are claimed,—much less when prosecuted for crimes; never in creeks, though the tide ebbs and flows there through half

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of our seaboard towns,—never in rivers. All is within the county, and is usually tried before State officers and by State laws.

It has just been remarked by one of my brethren, as to torts and crimes, as has been before said by some in controversies as to contracts, that the statutes of Richard the Second were not in force in the colonies. See 2 Gall., 398, 473; 1 Pet. Adm., 233; Ware, 91; Hall, Adm. Pr., 17, Pref. I cheerfully concede it may well be doubted whether any portion of the common law or English statutes, passed before the settlement of this country, became in force here, unless suited to our condition, or favorable to the subject and his liberties. But these statutes were both. They were suited to the condition of those attached to the common law and jury trial in the colonies, no less than at home, and they were in favor of the rights and liberties of the subject, to be tried by his own and not foreign laws, and by a jury for all matters happening within the realm, and not on the high seas. And so far from ancient statutes of that character not having any force here, they had as much as those parts of the common law which were claimed, October 14, 1774, by Congress among the “indubitable rights and liberties to which the respective colonies are entitled.” 1 Journal of Congress, 28. They came here with them, as a part of their admiralty law, as much as came any portion of the common law, or the trial by jury. They came as much as Magna Charta or the Bill of Rights, and they should exist here now, in respect to all matters, with all the vigor that characterized them at home at the time of our Revolution. Baldw., 551; *Ramsey v. Alleyne*, 12 Wheat., 638. So decided virtually in *Montgomery v. Henry*, 1 Dall., 53; *Talbott v. The Three Briggs*, Id., 106.

The principles, dear to freemen of the Saxon race,—preferring the trial by jury, and the common law, to a single judge in admiralty, and the civil law,—which were involved in these statutes, could be no less highly prized by our American fathers than their English ancestry, especially \*491] when we look to their numerous resolutions on \*this subject, both before and during the Revolution, cited in other portions of this opinion.\*

One of our soundest jurists has said long since,—“The

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\*They are so numerous as to remind one of the zeal and perseverance in favor of the great charter, which was such as to require it to be read twice a year in each cathedral, and to have it ratified anew over thirty times, when put in peril by encroaching monarchs. 1 Stat. at L. (English), 274, ch. 3; also, p. 1, note.



common law of England, and every statute of that country made for the benefit of the subject before our ancestors migrated to this country, were, so far as the same were applicable to the nature of their situation, and for their benefit, brought over hither by them; and wherever they are not repealed, altered, or amended by the constitutional provisions or legislative declaration of the respective States, every beneficial statute and rule of the common law still remains in force." Tucker, in Part II. of Bl. Com., App., 99; 2 Chalm. Op., 75; Woodcock, 159.\*

Whether the 13 and 15 of Richard II. were in affirmance of what was the true limit of admiralty jurisdiction at first in England, or otherwise, is not very material. But it is certain that it was likely to be but declaratory of that, as the people were so devoted to the common law trials by jury. The extraordinary idea, that these statutes were not in force here, was first broached in A. D., 1801, and then in a District Court, in direct opposition to the views expressed in 1 Dall., 53. The point then decided under that novel notion was, that a lien existed for repairs of a domestic ship, without the aid of any statute, and has been since expressly overruled by this court in *The General Smyth*, 4 Wheat., 413. And why overruled by this court, but on the principle that the admiralty jurisdiction here was what it had been in England before our constitution, and not elsewhere,—not that of France before the Norman conquest, or that of Holland now?

Indeed, Justice Story, as a commentator in respect to other clauses of the constitution no more open to such a construction than this, concedes that they are to be "understood" "according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American States were familiarly acquainted." 3 Story's Com. on the Constitution, 506, § 1639.

Nor let it be again offered in extenuation, that, the power being concurrent in the common law courts, the plaintiff from choice goes into the admiralty; because the other party, who is often prosecuted only to be vexed and harassed, and who has rights as well as the plaintiff, may be thus forced into

\* Thus people who go to form colonies "are not sent out to be slaves, but to enjoy equal privileges and freedom." Grotius, *De Jure Belli*, B. 2, ch. 9, § 10. Or "the same rights and privileges as those who staid at home." Or, as in the charter of Elizabeth to Raleigh, "enjoy all the privileges of free denizens or persons native of England." Part I. of Tucker's Bl., vol. 1, p. 383, App.

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\*492] admiralty, rather than the \*common law, much against his choice. Nor let it be said further, as an apology, that the trial by admiralty is better and more satisfactory, when our ancestors, both English and American, have resisted it, and excluded it in all common law cases, for reasons most vital to public liberty and the authority of the local tribunals. Such an enlargement of a power so disliked by our fathers is also unnecessary; because, if desirable to have the United States courts try such cases, rather than those of the States, they can be enabled to do it by express provisions, under the power to regulate foreign commerce and collect revenue, as is now done on the Lakes; 12 Pet., 75; 5 Stat. at L., 726; Act of February 26th, 1845; and reserving, as in that case, the right of trial by jury.\*

I have thus examined this question in all its various aspects, and endeavoured to answer all which has been suggested in favor of a change here as to the line of admiralty jurisdiction in the case of the collision of vessels, as well as other marine torts.

Among my remarks have been several, showing that there was nothing in our condition as colonists, or since, and nothing in the nature of the subject and the great principles involved, which should render the same line of jurisdiction not proper in America which existed in England, but in truth some additional reasons in favor of it here. I do not now, in conclusion, propose to dwell much on this peculiar condition of ours, though some members of this court have just urged it earnestly as a reason why the same line does not apply, as they have why the statutes of Richard II. did not apply. But the idea is as untenable in respect to the principle generally, looking to our condition, as we have already shown it to be in respect to those statutes. Thus, in that condition, what reason was there ever for a change? None. And, if otherwise believed, when we were colonies, would not the change have been made by acts of assembly approved at home, or an act of Parliament? And if not done when colonies, but

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\* As some evidence that the makers of this last law did not suppose it settled that the District Courts could, as admiralty courts, have any jurisdiction as to torts, because committed on tide-waters within a State, when they felt obliged to pass a special law to confer it on the Lakes, it was not conferred there as exercised on "tide-waters," which would have been sufficient, if so settled, but on "the high seas, or tide-waters within the admiralty and maritime jurisdiction," &c. This statute is also scrupulous to save the trial by jury when desired, and thus avoids treating it as an admiralty power got in torts, unless on the high seas, by a construction contrary to the political opinions and prejudices of our ancestors, and to the whole spirit of our institutions.

supposed to be proper after the Revolution, would not the framers of the constitution, or of the Judiciary Act, have known it as quickly and fully as this court? and was it not more proper for them to have made such a change than this court? If our political institutions or principles required it, did not they know, and should not they have attended to that rather than we? If such a change had already happened in the then thirteen colonies, and was too well known and acquiesced in, \*as to torts and crimes, to need any [\*493 written explanation or sanction, why cannot it be pointed out in colonial laws, or in judicial records, or at least in contemporaneous history of some kind? And if such a change was required and intended, as some insist, by resorting to other than English law for a guide as to what were admiralty cases within the meaning of the constitution, because something less narrow, geographically or otherwise, as it has been argued, something on a grander scale, and in some degree commensurate in length and breadth with our mighty rivers and lakes, was needed,—as if a system which had answered for trade over all the oceans of the globe was not large enough for us,—then why not extend it at least over all our navigable waters, and not halt short at the doubtful, and fluctuating, and pent-up limits of tide-water? And was a change so much required to go into the bodies of numerous counties and States, to the jeopardy of jury trials, by any increased dislike to them among our jealous fathers? Were they wishing, by mere construction, to let more and more go into the cognizance of the admiralty and be tried without a jury, and without the principles of the common law, when they had been so indignantly remonstrating against any and every the smallest encroachment by England on that sacred trial? And is this guarantee of a jury trial in such cases to be considered of subordinate moment in the views of those living at the era of the formation of the constitution, and the passage of the act of 1789, when their eagerness was such to guarantee it fully, that two of the only twelve amendments ever made to it relate to additional safeguards for this trial? And in the Judiciary Act of 1789, there are introduced, *ex industria*, three separate provisions to secure jury trials.

Indeed, so far from there being any thing in our condition as colonists, or in public opinion at the Revolution, which demanded a change enlarging admiralty forms and jurisdiction, the old Congress specially resolved, November 25th, 1775, when recommending to the colonies to institute courts to try captures, or devolve the power on those now existing, that they “provide that all trials in such case be had by a

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jury," which was going further in their favor, instead of short of what had ever been done in England. And, in 1779, Virginia established admiralty courts, under recommendation of the old Congress, and expressly allowed a jury in all cases where either party desired it, if both were citizens. 10 Hening's Stat., 101. The same is understood to have been done in several other States. See *The Federalist*, No. 83. In Massachusetts, under the old charter, as long ago as 1673, the court of admiralty was expressly authorized to allow a jury when it pleased. *Ancient Charters and Laws*, 721 (App.). Iredell says, also, in the North Carolina Convention (4 Elliot's Deb., 155):—"There are different practices in regard to this trial in different States. In some \*494] cases they have no juries in admiralty and equity cases; in others, they have juries in them as well as in suits at common law."

And to the objections made against adopting the constitution, because the trial by jury might be restricted under it and suitors be compelled to travel far for a hearing in ordinary cases (1 Gales's Debates in First Congress), it was argued that Congress would possess the power to allow juries even in cases in admiralty (*The Federalist*, No. 83), and afterwards, by the original amendments to the constitution, it was made imperative to allow them in all "cases at common law." Yet now, by considering torts within a county as triable, or as "cases in admiralty," which was not done by the common law, nor when the constitution was adopted, either in England or here, we produce both the great evils deprecated,—an abridgment of the jury trial from what prevailed both here and in England, and the forcing of citizens to a great distance from their State tribunals, to defend their rights under a different forum and a different system of laws.

After these additional proofs of the caution of our ancestors to check the usual admiralty power of trial without a jury, and more especially to prevent any extension of it, could they for a moment, when so jealous of the general government and its overshadowing powers, wish to extend them further than ever before, either here or in England? \* Did they mean to relinquish their time-honored and long-cherished trial for

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\* Indeed, in England it has been controverted whether the power in admiralty to punish torts anywhere ever existed, even before Richard II. (3 Mason, 244), except through a jury, used to settle the facts and assess the damages. See 4 Rob. Adm., 60, note to *Rucker's case*. The Black Book of the Admiralty, art. 12, p. 169, is cited as speaking of the use of a jury twice in such cases. See also Roughten, *De Of. Admiralli*, 69, note. And at this day, in England, in this class of torts, as hereafter shown, the masters of Trinity House act virtually as a jury.

torts on water within a county, and take for a model despotic France, for instance, which knew no trial by jury in any case, and where the boundaries between the admiralty and other courts were almost immaterial, being equally under the civil law, and equally without the safeguard of their peers? And would they be likely to mean this, or wish it, when every such extension of admiralty jurisdiction was at the expense of the State courts, and transferring the controversies of mere citizens of one State to distant jurisdictions, out of their counties and in certain events to the remote seat of the general government, and then to be tried there, not by the common law, with whose principles they were familiar, but by the civil, and when a full remedy existed at home and in their own courts? Much less could they be supposed willing to do this when the trial of facts in this court was not to be by their peers from the vicinage, or on oral testimony, so that the witnesses could be seen, scrutinized, and well compared, but by judges, who, however learned in the law, are less accustomed to settle facts, and possess less practical acquaintance with the \*subject-matter in controversy. And [\*495 what are the urgent and all-controlling reasons which exist to justify the new line urged upon us, in such apparent violation of the constitution, and with so inauspicious a departure from any thing required by our condition, or from what seems to have been the principles and precedents at the Revolution?

It is not the line even of the civil law, any more than of the common law. If this innovation had extended admiralty jurisdiction over all navigable waters, it would have been, at least, less vague, and found some vindication in its analogy to the civil code. Digest, 43, tit. 12, 13; Code Napoleon, B. 2, ch. 2, tit. 556; Zouch's Elements of Jurisp., 382. But the rule of tide-water within a county, and not on the sea, conforms to no code nor precedent; neither marching boldly over all which is navigable, nor halting where the ocean meets the land; neither shunning to make wide inroads into the territories of juries, nor pushing as far as all which is nautical and commercial goes. The only plausible apology for it, which I can find, is in a total misconception, before adverted to, of the ancient and true rule, which was tide-water, but at the same time tide-water without the body of the county, on the high seas. But instead of the flux and reflux of the tide on the high seas, and without the body of the county or State, and to support which line stood the great pillars of a jury trial and the common law, have been attempted to be substituted, and that without authority of any

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statute or clause in the constitution, as to torts, the impulses from the tides at any and every distance from the ocean, sometimes encroaching from one to two hundred miles into the interior of counties and States, and prostrating those great pillars most valuable to the people of the States. And what, let me repeat the inquiry, is gained by such a hazardous construction? Not an adherence to old and established rules, not a respect for State rights; not strengthening the Union or its clear powers where assailed, but weakening by extending them to doubtful, irritating, and unnecessary topics; not an extension of a good system, allowing the admiralty to be one for all nautical matters, to all navigable waters and commercial questions, but falling short, in some of our vast rivers or inland seas, near one thousand miles from the head of navigation, and cutting off several cities with twenty, thirty, and even forty thousand population. The late act of February 26th, 1845 (5 Stat. at L., 726), was intended to remedy this, but does not include any cases above tide-water on the Mississippi, or Cumberland, or Ohio, and many others, but only those on the Lakes and their tributaries, and very properly even there reserves, with scrupulous care, not only the right to either party of a trial by jury, but any remedy existing at common law or in the States.

So, looking to results, if we disclaim jurisdiction here, what evil can happen? Only that our citizens in this class of cases \*496] will be \*allowed to be tried by their own State courts, State laws, and State juries. While, if we do the contrary, the powers of both States and juries will be encroached on, and just dissatisfaction excited, and the harmonious workings of our political system disturbed. So, too, if our national views have become actually changed so greatly, that a trial by a single judge, and in admiralty, is preferred to a trial by jury in the State tribunals or the Circuit Courts, then our overruling the jurisdiction in this case will only leave Congress to declare the change, and provide for it, rather than this tribunal.

So the excuse for trying such cases in admiralty rather than in courts of common law, which some have offered, on the ground that the rules of decision are much the same, appears very ill-considered, when, if the civil law in this instance does not differ essentially from the common law, the rules of evidence by it do, depriving us, as triers, of the sight of the witnesses, and their apparent capacity and character, and depriving the defendant of the invaluable trial by jury, and stripping him of the right of being tried, and the State courts of the right of trying controversies between their citizens, in

the neighbourhood where they occur. "All controversies directly between citizen and citizen will still remain with the local courts," said Mr. Madison in the Virginia convention. 3 Elliot's Deb., 489.

Now, after all this caution exercised in England not to extend nor change admiralty jurisdiction there without the aid of express statute and a reservation of common law remedies,—after a refusal to do it here recently as to the Lakes and their tributaries, except in the same way, and preserving the trial by jury,—after all the sensitiveness of our fathers in not doing it as to seizures for breach of revenue and navigation laws, except by express statute,—after their remonstrances and cautions in various ways against abridging the trial by jury,—after the jealousy entertained when the constitution was adopted, that this court might absorb too much power from the State tribunals, and the respect and forbearance which are always justly due to the reserved rights of the States,—it certainly seems much wiser in doubtful cases to let Congress extend our power, than to do it ourselves, by construction or analogy.

So far from disturbing decisions and rules of property clearly settled, I am for one strongly disposed to uphold them, *stare decisis*, and hence I am inclined in this case to stand by the ancient landmarks, and not set every thing afloat,—to stand, in fine, by decisions, repeated and undoubted, which govern this jurisdiction, till a different rule is prescribed by Congress.

The first doubt as to the jurisdiction in admiralty over the present case is thus sustained, but, being overruled by a majority of the court, I proceed briefly to examine the next objection. It is one founded in fact. It denies that the tide did in truth ebb and flow at Bayou Goula, the place of this collision, in ordinary times.

There is no pretence that the water there is salt, or comes back \*from the ocean, or that the tide there sets up-ward in a current, or ever did, in any stage of the [\*497 water in the Mississippi. Yet this is the ordinary idea of the ebb and flow of the tide. I concede, however, that it has been settled by adjudged cases, that the tide is considered in law to ebb and flow in any place where it affects the water daily and regularly, by making it higher or lower in consequence of its pulsations, though no current back be caused by it. *Rex v. Smith*, 2 Doug., 441; *The Planter*, 7 Pet., 343; *Hooker v. Cummings*, 20 Johns. (N. Y.), 98; *Ang. Tide Waters*, 637. Yet this of course must be a visible, distinct rise and fall, and one daily caused by the tides, by being reg-

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ular, periodical, and corresponding with their movements. Amidst conflicting evidence on a point like this, it is much safer to rely on collateral facts, if there be any important ones admitted, and on expert or scientific men, who understand the subject, than on casual observers. The sea is conceded to be two hundred and three miles distant; and the current of the Mississippi so strong as to be seen and felt far out to sea, sometimes quite forty miles. The tides on that coast are but eighteen or twenty inches high. The velocity of the current of the river is ordinarily three to four miles an hour in high water, and the river is two hundred feet deep for one hundred miles above New Orleans. Stoddard's Hist. of Louisiana, 158. It therefore becomes manifest, that on general principles such a current, with its vast volume of water, could not only never be turned back or overcome by the small tides of eighteen inches, as the fact of its influence forty miles at sea also demonstrates, but would not probably, in ordinary times, be at all affected in a sensible and regular manner two hundred and three miles distant, and weakened by all the numerous bends in that mighty river. From New Orleans to St. Louis the bends are such, that a boat must cross the stream 390 times. Stoddard's Hist. of Louisiana, 374.

Again, the descent in the river from the place of this collision to the ocean is quite a foot and a half, all the usual rise of the tide on the coast; and hence, at a low stage of water in the river, much more at a high one, thirty feet above the lowest, no tides are likely to be felt, nor would they probably be during the whole season of a full river, from November to June.

In the next place, several witnesses testify as to their observations in respect to the tides, and confirm what might be expected from these collateral facts. The most scientific among them took frequent observations for two years, at or nigh Jefferson College, thirty-seven miles nearer the sea than the place of this collision, to ascertain this very fact, and testifies that no regular daily influence is felt there from the tides. Oscillations may occur, but not regularly, nor as tides. They happen in that way even near the foot of the Falls of Niagara, but of course are produced by causes entirely  
\*498] \*disconnected from the tides of the ocean. So they happen, from other causes, on most of our interior lakes.

Sometimes continued winds in one direction make a great difference in the rise of the water at different places; and sometimes, the emptying in near of large tributary streams, changeable in their size at different seasons. Both of these



are testified to occur in the Mississippi in its lower parts. At high water, which prevails over half the year, from rains and the dissolving of snow, it also deserves notice, that the fall of the river towards the ocean is near one and two-thirds of an inch per mile; and the difference between high and low water mark near Bayou Goula is also, as before noticed, from thirty to thirty-three feet.

From all this it is easy to see, that, during more than half the year, it is hardly possible that a regular tide from the ocean should be felt there, though it is admitted that, in conflict with this, some witnesses testify to what they consider such tides there, and indeed as high up as Bayou Sarah. But their evidence is insufficient to overcome, in my mind, the force of the other facts and testimony on this subject.

In connection with this point, it seems to be conceded, also, that, in order to give admiralty jurisdiction, the vessels must be engaged in maritime business, as well as the collision have occurred where the tide ebbs and flows. There might be some question, whether the main business of either of these boats was what is called maritime, or touching the sea,—*mare*,—so as to bring them and their business within the scope of admiralty power. If, to do that, they must be employed on the high seas, which is the English rule, neither was so engaged in any part of its voyage or business. Or if, for that purpose, it is enough, as may be contended in this country, that they be engaged exclusively on tide-waters, neither was probably so employed in this instance. And it is only by holding that it is enough for one end of the voyage to be in tide-water, however fresh the water or slight the tide, that their employment can be considered maritime.

In *The Thomas Jefferson*, 10 Wheat., 428, the court say, the end or beginning of the employment may be out of tide-water, if “the service was to be substantially performed on the sea or tide-water.” So in *The Phœbus*, 11 Pet., 183. But in the case of *The Thomas Jefferson*, as well as *The Phœbus*, the service, being in fact chiefly out of tide-waters, was not considered as maritime.

In the case of *The Planter*, 7 Pet., 324, the whole service performed was in tide-waters, and was a contract, and hence deemed maritime. Here the boats were employed in the trade between New Orleans at one point, and Bayou Sarah at the other, a distance of one hundred and sixty-five miles. If the tide ebbs and flows as high as Bayou Goula, or ninety-seven miles above New Orleans, which we have seen is doubtful, it is only a small fraction \*above half the distance, but not enough above half to characterize the main

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employment of the vessel to be in tide-waters, or to say that her service was substantially on the sea, or even tide-water. The De Soto made trips still higher up than Bayou Sarah, to Bayou Tunica, twenty-seven miles farther from New Orleans. The testimony is, also, that both these boats were, in their construction, river, and not sea, boats; and the De Soto was built for the Red River trade, where no tides are pretended to exist, and neither was ever probably on the ocean, or within a hundred miles of it.

It is doubtful if a vessel, not engaged in trade from State to State, or from a State abroad, but entirely within a State, comes under laws of the general government as to admiralty matters or navigation. It is internal commerce, and out of the reach of federal jurisdiction. Such are vessels on Lake Winnipiseogee, entirely within the State of New Hampshire. In the Luda and De Soto they were engaged in internal commerce, and not from State to State, or from a State to a foreign country. 1 Tucker's Bl. Com., 250, note.

In most cases on the Mississippi, the boats are engaged in the coasting trade from one State to another, and hence are different, and assume more of a public character. So on the Lakes the vessels often go to foreign ports, as well as to other States, and those on the seaboard engaged in the fisheries usually touch abroad, and are required to have public papers. But of what use are custom-house papers or admiralty laws to vessels in the interior, never going from State to State, nor from a State to a foreign country, as was the situation and employment at the time of these two boats?

These are strong corroborations that this is a matter of local cognizance,—of mere State trade,—of parties living in the same county, and doing business within the State alone, and should no more be tried without a jury, and decided by the laws of Oleron and Wisby, or the Consulat del Mare, or the Black Book of Admiralty, than a collision between two wagoners in the same county.

The second objection, then, as a whole, is in my view sustained; and, being one of mere fact rather than law, it is to be regretted that the court could not have agreed to dismiss the libel on that ground, without settling the other points, and without prejudice to the rights of either party in a trial at common law. The plaintiff would then be enabled to have all the facts on the merits examined and adjudicated by a jury from the valley of the Mississippi; much more skilful than this court, from their residence and experience, in judging upon accidents and negligences in navigation on that great thoroughfare.

The only good reason that the admiralty judge was ever intrusted with the decision of facts, rather than a jury, was, that originally he was but a deputy of the admiral, and often a nautical man,—acquainted with nautical matters, and acting only on them; and now in \*England he calls to his aid on facts the experienced nautical officers or masters [\*500 of the Trinity House,—“a company,” says Coke, “of the chiefest and most expert masters and governors of ships.” 4 Inst., 149. He takes their opinion and advice on the facts as to collisions of vessels before he himself decides. 2 Bro. Civ. & Adm. Law, 112; 6 T. R., 766; *The Celt*, 3 Hagg. Adm., 327. The case is often fully argued before them first. 1 Wm. Rob., 133–135, 273, 314; Hall, Adm. Pr., 139; 5 Rob. Adm., 347. But everything here is so different, and so much against the skill of judges of this court in settling such facts, that in cases of doubt we are very likely, as has now happened, to disagree, and it is far better they should be examined by a jury in the vicinage of the collision.

Perhaps it was a consideration like this that led to the doctrine, both abroad and here, in favor of the common law courts having concurrent jurisdiction in these cases of collision, even when they happen on the high seas. 1 Chit. Pl., 152, 191; 15 Mass., 755; 3 East, 598; *Percival v. Hickey*, 18 Johns. (N. Y.), 257; 15 Id., 119; 14 Id., 273; Curtis Mer. Seamen, 367; 9 Johns. (N. Y.), 138; *Smith v. Condry*, 1 How., 36; Gilp., 483; 4 Mason says it is claimed; 2 Gall., 343, on precedent.

Indeed, the laws of Louisiana are quoted as pertaining to and regulating the conduct of boats when passing on the Mississippi within that State. 1 Bull. & C. Dig., § 794. But so far from their being a guide to us in admiralty, if having jurisdiction in that way over these boats at this place, the rights of parties, as before seen in such questions, are to be settled by the laws existing in some undescribed part of the world, but not England in A. D., 1776 or A. D., 1789, or Louisiana in A. D., 1845. If England, this case would not be tried at all in admiralty, as we have seen; and if Louisiana, then the case would not be settled by admiralty law, but by the laws of Louisiana, and in the State tribunals.

Again, whoever affirms jurisdiction to be in the courts of the United States must make it out, and remove all reasonable doubts, or the court should not exercise it. *Bobyshall v. Oppenheimer*, 4 Wash. C. C., 483; 7 Pet., 325; Pet. C. C., 36. Because these courts are courts of limited jurisdiction, and acting under express grants, and can presume nothing beyond the grant, and because, in respect to admiralty power, if any

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thing is presumed when not clear, it is presuming against the trial by jury, and the State tribunals, and their reserved rights. Where a jurisdiction is of a limited nature, "they [claiming it] must show that the party was brought within it." 1 East, 650. And where a case is in part dependent on common law, and in part on admiralty, it must be tried in the courts of the former. Bee, 470.

But the second objection to our jurisdiction being also considered by the court untenable, the case is to be examined \*501] on the \*merits; and as to these it seems to me not free from difficulty, though in my view indicating some fault in both the boats.

From the very nature of navigation,—as vessels cannot be always turned quick, and as a constant lookout is hardly practicable both night and day,—collisions on rivers with frequent bends in them, like the Mississippi, and during darkness, are occasionally almost inevitable, and often are attended by no blame. The danger and injury to both vessels is so great in almost every case, one or both not unseldom going down, with all on board, that the strongest motives exist with all to use care and skill to avoid collisions. The want of them, therefore, is never to be presumed, but is required to be clearly proved. To presume otherwise would be to presume men will endanger their own lives and property, as well as those of others, without any motive of gain or ill-will.

Hence our inquiries must start with the probability, that, in such collisions, accident and misconception as to courses and distances caused the injury, rather than neglect or want of skill. Indeed, in these cases it is laid down as a rule by Sir Christopher Robinson, in *The Ligo*, 2 Hagg. Adm., 356, that "the law requires that there shall be *preponderating* evidence to fix the loss on the party charged, before the court can adjudge him to make compensation." 2 Dods., 83. I am unable to discern any such clear preponderance in this case in favor of the Luda. It is true that some allowance must be made as to the testimony of the officers and men in each boat. In both they would naturally be attached to her character or interests, and desirous in some degree of vindicating themselves or friends. And it happens that, from such or some other cause, those on each side usually testify more favorably as to the care and skill with which the boat was conducted in which they were employed at the time. Hence resort must be had to some leading and admitted facts as a guide, when they can be distinctly ascertained, to see whether the collision was from any culpable misconduct by either.

For like reasons, we should go to witnesses on shore and passengers, where they had means of knowledge, rather than to the officers and crews implicated on either side. Taking these for our guidance chiefly, and so far as it is possible here to decide with much accuracy, most of the case looks to me, on the facts, quite as much like one of accident, or one arising from error of judgment and mutual misapprehension, as from any culpable neglect on the part of the officers of the De Soto alone.

It is to be remembered, that this collision occurred in the night; that neither of the regular captains were on the deck of either boat, though both pilots were at their stations; that being near a landing, the De Soto supposed the Luda was going to stop there, and hence pursued a different course from what she would if not so supposing; and that the Luda supposed the De Soto would not stop there, and hence did not pursue the course she would if believing she was \*about to stop. That both boats in the darkness [502 seemed, till very near, to believe each other farther off than they in truth were, and hence did not use so early the precautions they otherwise might have done. It is to be remembered, also, that not one of the usual sources of blame in the adjudged cases existed here clearly on the part of the De Soto. Some witnesses swear to the De Soto's having her light hung out, and several, including a passenger, that if the Luda had not changed her course unexpectedly, and when near, she would not have been struck by the De Soto; and that the De Soto, if changing hers, and going lower down than her port, did so only to round to and lay with her head up in the customary manner. Nor was there any racing between rivals, to the peril of the vessels and life, which led to the misfortune, and usually deserves condign punishment. Nor was any high speed attempting for any purpose; and the movement of the De Soto, though with the current, is sworn to have been slowest, and hence she was less bound to look out critically. *The Chester*, 3 Hagg. Adm., 819. Nor is there any law of admiralty requiring a descending boat on a river to lie still till an ascending one approaches and passes, though an attempt was made to show such a usage on the Mississippi, which was met by counter evidence. Again, the Luda was not at anchor, so as to throw the duty on the De Soto to avoid her, as is often the case on the sea-coast. *The Girolamo*, 3 Hagg. Adm., 169; *The Eolides*, Id., 369. Nor was the Luda loaded and the other not, but in ballast and with a wind, and hence bound not to injure her. *The Baron*

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*Holberg*, 3 Hagg. Adm., 244; *The Girolamo*, Id., 173. Nor was one moved by steam and the other not, and hence the former, being more manageable, obliged to shun the latter. *The Shannon*, 2 Hagg. Adm., 173; *The Perth*, 3 Hagg. Adm., 417. Nor is there a rule here, as in England, issued by the Trinity House in 1840, and to be obeyed or considered bad seamanship, that two steamboats approaching, and likely to hit, shall put their helms to port, though the principle is a sound one on which it rests. 1 Wm. Rob., 274, 275; 7 Jur., 380, 999. Under considerations like these, if any blame rests on the *De Soto*, and there may be some, certainly quite as much seems to belong to the *Luda*. Neither put the helm to port. Both boats were in my view too inattentive. Both should have stopped their engines earlier, till the course and destination of each other were clearly ascertained; and both should have shaped their courses wider from each other, till certain they could pass without injury. 7 Jur., 380; 8 Id., 320. The *Luda* certainly had more conspicuous lights, though the *De Soto* is sworn not to have been without them, and is admitted to have been seen by the *Luda* quite half a mile off, though in the night. On the contrary, the movements of the *De Soto* were slowest, which is a favorable fact in such collisions (7 Jur., 381), though she did not lie by, as she should have done, under the law of Louisiana, if that \*503] was in force, \*and she wished to throw all the risk on "the ascending boat"; for throwing that risk so is the only gain by conforming to the statute. 1 Louis. Dig., 528, Art. 3533, by Grimes.

But I do not propose to go more fully into this, as it is not the point on which I think the case should be disposed of. I merely refer to enough to show it is a question of difficulty and doubt whether the injury did not result from casualty, or mutual misapprehension and blame, rather than neglect, except in particulars common to both, or at least in some, attached to the plaintiffs, if not so great, as those in respect to which the original defendants erred. Any fault whatever in the plaintiffs has, it is said in one case, been held to defeat his action. *Vanderplank v. Miller*, Moo. & M., 169. But in any event, it must influence the damages essentially. For though, when one vessel alone conducts wrongfully, she alone must pay all damages to the extent of her value (5 Rob. Adm., 345), and this agrees with the laws of Wisbuy if the damage be "done on purpose" (2 Pet. Adm., 84, 85, App.), and with the laws of Oleron (2 Id., 28); yet if both vessels were culpable, the damage is to be divided either

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equally between them<sup>1</sup> (3 Hagg. Adm., 328, note; 4 Ad. & E., 431; 9 Car. & P., 613; *Reeves v. The Constitution*, Gilp., 579), or they are to be apportioned in some other more appropriate ratio, looking critically to all the facts. *The Woodrop-Sims*, 2 Dods. Adm., 85, 3 Scott, N. R., 336, 3 Man. & G., 59; Curtis Adm., 145, note. So in England, though no damages are given, when there is no blame on the part of the defendant. *The Dundee*, 1 Hagg. Adm., 120, *Smith et al. v. Condry*, 1 How., 36; 2 Bro. Civ. Adm. Law, 204. Yet, by the laws of Wisbuy, 1 Pet. Adm., 89, App.,—"If two ships strike against one another, and one of them unfortunately perishes by the blow, the merchandise that is lost out of both of them shall be valued and paid for *pro rata* by both owners, and the damage of the ships shall also be answered for by both according to their value." Sea Laws, 141. This is now the law in Holland, and is vindicated by Bynkershoek, so as to cover cases of doubt and equalize the loss. 2 Bro. Civ. & Adm. Law, 205, 206. So now on the Continent, where a collision happened between vessels in the river Elbe, and it was not the result of neglect, the loss was divided equally. Story, Conf. of L., 423; *Peters et al. v. Warren Ins. Company*, 14 Pet., 99; 4 Ad. & E., 420.

Hence, whether we conform to the admiralty law of England on this point, though refusing to do it on other points, or take the rule on the Continent for a guide, the amount of damages allowed in this case is erroneous, if there was any neglect on the part of the original plaintiffs, or if the collision between the boats was accidental.

Judge DANIEL requested his dissent to the judgment of the court to be entered on the record, and for reasons concurring generally with those offered by Judge Woodbury.

\*Mr. Justice GRIER concurred with Mr. Justice Woodbury in the opinion delivered by him, so far as [\*504 it related to the question of the jurisdiction of courts of admiralty, and also that the weight of evidence in this case was against the existence of a tide at the place of collision, but concurred with the majority of the court that the De Soto was in fault, and justly holden for the whole loss occasioned by the collision.

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<sup>1</sup> CITED. *Stainback v. Rae*, 14 How., 538.

## License Cases.—Thurlow v. Massachusetts.

**SAMUEL THURLOW, PLAINTIFF IN ERROR, v. THE COMMONWEALTH OF MASSACHUSETTS.**

**JOEL FLETCHER, PLAINTIFF IN ERROR, v. THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.**

**ANDREW PEIRCE, JR., AND THOMAS W. PEIRCE, PLAINTIFFS IN ERROR, v. THE STATE OF NEW HAMPSHIRE.**

Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted,—

Of Rhode Island, forbidding the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted from the original importer,—

Of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge and there sold in the same barrel,—

All adjudged to be not inconsistent with any of the provisions of the constitution of the United States or acts of Congress under it.<sup>1</sup>

<sup>1</sup> APPROVED. *Passenger Cases*, 7 How., 470, 497, 507. DISTINGUISHED. *Henderson v. Mayor of New York*, 2 Otto, 274. FOLLOWED. *Wagner v. People*, 97 Ill., 335. CITED. *Passenger Cases*, 7 How., 519, 522, 524 et seq.; *Veazie v. Moore*, 14 How., 575; *Sinnot v. Davenport*, 22 Id., 243; *Gilman v. Philadelphia*, 3 Wall., 730; *Pervear v. Commonwealth*, 6 Id., 479; *Woodruff v. Parham*, 8 Id., 139; *United States v. Dewitt*, 9 Id., 45; *Osborne v. Mobile*, 16 Id., 462; *Beer Company v. Massachusetts*, 7 Otto, 33; *Patterson v. Kentucky*, Id., 503; *Coleman v. Tennessee*, Id., 531; *County of Mobile v. Kimball*, 12 Id., 701; *United States v. Bridleman*, 7 Sawy., 250; *Woods v. State*, 36 Ark., 38; *State v. Ah Chew*, 16 Nev., 55. See also, *State v. Cate*, 58 N. H., 241.

The License cases have been cited in Circuit and District Courts upon the following subjects In an indictment against a bridge as a nuisance for being built across a navigable river. *United States v. New Bedford Bridge*, 1 Woodb. & M., 401, 424. That a State law must always give way to a

law of the United States where they conflict. *Perry Manuf. Co. v. Brown*, 2 Woodb. & M., 449, 471.

The following are some of the decisions of the courts: Commerce cannot be carried on without the agency of persons; and a tax, the effect of which is to diminish personal intercourse, is a tax on commerce; therefore, the legislature could not pass a law imposing on Mongolians who remain within the State, a certain tax per head. *Lin Sing v. Washburn*, 20 Cal., 534; but one requiring foreigners to take out a license for the privilege of working mines was constitutional, but not upon the ground that they could be taxed merely for the privilege of residing in the State. *People v. Nagles*, 1 Cal., 232.

A law for revenue, laying a distinctive tax on the business of foreign corporations doing business in the State, such business consisting of the transportation of goods, *in transitu*, from State to State, and the tax being graduated by the weight of the goods and the number of the passengers



## License Cases.—Thurlow v. Massachusetts.

THESE cases were all brought up from the respective State courts by writs of error issued under the twenty-fifth section

carried, is an infringement of the clause of the Constitution of the United States giving Congress the regulation of commerce between the several States. *Erie Ry Co. v. State*, 2 Vr. (N. J.), 531; reversing, 1 Id., 473.

The State has no right to impose a tax for revenue on liquors imported from foreign countries, so long as they remain in the hands of the importer, and in the original casks and barrels in which they are imported; but the restriction on the State's right to tax ceases, when such liquor passes out of the hands of the importer, or when the original casks are broken by him; and does not extend to liquor brought here for other States of the Union. *Hinson v. Lott*, 40 Ala., 123.

An ordinance requiring every express company or railroad company doing business in a certain city, and whose business extends beyond the limits of the State, to pay a license fee, is valid, and is not a tax on an import or export, nor is it a regulation of foreign commerce. *Osborne v. Mobile*, 44 Ala., 493; s. c., 16 Wall., 479; nor is a tax requiring express companies to pay a specific tax on the gross amount of current business within the State. *Walcott v. People*, 17 Mich., 68; *Commonwealth v. Erie Ry Co.*, 62 Pa. St., 286; s. c., 1 Am. Rep., 399.

A State law prohibiting the sale of intoxicating liquor on Sunday, and forfeiting the offender's license to sell on a second conviction, is not in violation of the federal constitution, but only a police regulation of the State. *Bode v. State*, 7 Gill (Md.), 326 (1848).

An ordinance declaring the selling of spirituous liquor a nuisance, and imposing a fine for the offence, is valid, if the corporate powers conferred upon the town or city are broad enough to authorize the ordinance. *Goddard v. Jacksonville*, 15 Ill., 588; *Byers v. Olney*, 16 Ill., 35; *King v. Jacksonville*, 2 Scam. (Ill.), 305; *Jacksonville v. Holland*, 19 Ill., 272; *Pekin v. Smelzel*, 21 Ill., 469; *Block v. Jacksonville*, 36 Ill., 303; *Jones v. People*, 14 Ill., 196.

The legislature has the constitutional power to prohibit the sale of liquor or beer by retail. The court says that it is no longer an open question. *Kettering v. Jacksonville*, 50 Ill., 39. Such a law is subject only to the laws of the United States regulating imports, and these protect it only in the hands of the importer, in the original cask or package. Though a State is bound to admit an article thus imported under the laws of Congress, it is not bound to find a market for its sale. When sold by the importer in the original cask or package, or when broken up for retail sale, it becomes subject to the State laws; and may be taxed or the sale prohibited. *State v. Allmond*, 2 Houst. (Del.), 612; *Mason v. Luncortes*, 4 Bush (Ky.), 406; *Perdue v. Ellis*, 18 Ga., 586; *Dorman v. State*, 34 Ala., 216; *Lincoln v. Smith*, 27 Vt., 328; *State v. Robinson*, 49 Me., 285; *People v. Hawley*, 3 Mich., 330; *People v. Collins*, 3 Mich., 343.

So the State has the power to vest in a county board a discretion whether the license will be granted or not, and the board may thereby refuse such license, which refusal cannot be questioned in an appellate court. *Ex parte Whittington*, 34 Ark., 394; see *Bancroft v. Dumas*, 21 Vt., 456.

There is no doubt but what the State may regulate the sale. *Woods v. State*, 36 Ark., 38; s. c., 38 Am. Rep., 22; *Keller v. State*, 11 Md., 595; *Thomasson v. State*, 15 Ind., 449; *Bancroft v. Dumas*, 21 Vt., 456; *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 657; *Lincoln v. Smith*, 27 Vt., 328; *State v. Prescott*, 27 Vt., 194; *Intoxicating Liquor Cases*, 25 Kan., 751; s. c., 37 Am. Rep., 284; *State v. Wheeler*, 25 Conn., 290; *State v. Brennan's Liquors*, Id., 278.

Licenses to sell liquors are not contracts between the State and the licensee, giving the latter vested rights, protected on general principles, or by the Constitution of the United States, or by the constitution of the State. *Metropolitan Board of Excise v. Barrie*, supra.

Where the legislature chartered a corporation for the manufacture of

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of the Judiciary Act, and were commonly known by the name of the License Cases.

Involving the same question, they were argued together, but by different counsel. When the decision of the court was pronounced, it was not accompanied by any opinion of the court, as such. But six of the justices gave separate opinions, each for himself. Four of them treated the cases collectively in one opinion, whilst the remaining two expressed opinions in the cases separately. Hence it becomes necessary for the reporter to make a statement in each case, and to postpone the opinions until the completion of all the statements. The arguments of counsel in each case will of course follow immediately after the statement in that case. They are placed in the order in which they are put by the Chief Justice in his opinion, but where the justices have given separate opinions in each case, the order is observed which they themselves have chosen.

\*505] \*Mr. Chief Justice Taney, one opinion, three cases.

(p. 573.)

Mr. Justice McLean, three opinions.

No. 1. *Thurlow v. Massachusetts.* (p. 586.)

No. 2. *Peirce v. New Hampshire.* (p. 593.)

No. 3. *Fletcher v. Rhode Island.* (p. 596.)

beer, it was held that, by a general law, it might require of such corporation to take out a license. *Commonwealth v. Intoxicating Liquors*, 116 Mass., 153; *Beer Co v. Massachusetts*, 7 Otto, 25.

A statute prohibiting the sale of liquor without a license is valid and renders void a note given in another State for the purchase of liquor in that State, when the salesman knew that the liquors were to be carried into the first State and sold in violation of the law. *Reynolds v. Geary*, 20 Conn., 179; *State v. Peckam*, 3 R. I., 289; *Schlesinger v. Stratton*, 9 R. I., 578. So a law which prohibits manufacturers and others from selling or keeping for sale within the State, liquors which may have been manufactured or bought by them previous to its passage, is not an *ex post facto* law; since, so far as it punishes such selling and keeping, it is prospective; and if it lessens the value of liquor owned in the State previous to, and

held at the time of its passage, such civil consequences do not make it retroact criminally, in such sense, or to bring it within the definition of an "*ex post facto*" law. Nor is it a law impairing the obligation of a contract, since the right to sell, or keep for sale, intoxicating liquors, and to prescribe the places and mode of their sale within the State, is within the police powers of the State, subject to which such property is holden. *State v. Paul*, 5 R. I., 185. The general assembly have the constitutional right to regulate or prohibit the sale of intoxicating liquors within the limits of the State at the time of the prohibition, as well as those within the State afterwards; and to provide process by which, if illegally sold or kept for sale, they may be confiscated or destroyed, and to declare the buildings and places in which such liquors are illegally sold or kept for sale, to be common nuisances. *State v. Keeran*, 5 R. I., 497.

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Mr. Justice Catron,	two opinions.	
No. 1. <i>Peirce v. New Hampshire.</i>		(p. 597.)
No. 2. <i>Thurlow v. Massachusetts.</i>		(p. 609.)
Mr. Justice Daniel,	one opinion, three cases.	(p. 611.)
Mr. Justice Woodbury,	one opinion, three cases.	(p. 618.)
Mr. Justice Grier,	one opinion, three cases.	(p. 631.)

To begin with the case of

*Thurlow v. The Commonwealth of Massachusetts.*

This case was brought up from the Supreme Judicial Court of Massachusetts. The plaintiff in error was indicted and convicted, under the Revised Statutes of the State, for selling liquor without a license. The indictment contained several specifications, but they were all similar to the first, which was as follows:—

“The jurors, for the Commonwealth of Massachusetts, upon their oath present, that Samuel Thurlow, of Georgetown, in said county, trader, on the first day of May, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the Revised Statutes of said Commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum, and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said Commonwealth and the form of the statute in such case made and provided.”

It becomes necessary to insert the forty-seventh chapter of the Revised Statutes, and also an act passed in 1837. They are as follows:—

*Revised Statutes of Massachusetts, Chap. 47.—The Regulation of Licensed Houses.*

“Section 1. No person shall presume to be an innholder, common victualler, or seller of wine, brandy, rum, or any other spirituous liquor, to be used in or about his house, or other buildings, unless he is first licensed as an innholder or common victualler, according to the provisions of this chapter, on pain of forfeiting one hundred dollars.

“Sect. 2. If any person shall sell any wine or spirituous liquor, \*or any mixed liquor, part of which is spirituous, to be used in or about his house or other build- [506

ings, without being duly licensed as an innholder or common victualler, he shall forfeit for each offence twenty dollars.

"Sect. 3. No person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is [at] first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offence.

"Sect. 4. If any person, licensed to be a retailer as aforesaid, shall sell any of the above liquors, either mixed or unmixed, to be used in or about his house or shop, he shall forfeit for each offence twenty dollars.

"Sect. 5. Every innholder shall at all times be furnished with suitable provisions and lodging for strangers and travellers, and with stable-room, hay, and provender for their horses and cattle; and if he shall not be at all times so provided, the county commissioners may revoke his license.

"Sect. 6. Every common victualler shall have all the rights and privileges, and be subject to all the duties and obligations, of innholders, excepting that he shall not be required to furnish lodgings for travellers, nor stable-room, hay, and provender for horses and cattle.

"Sect. 7. Every innholder and common victualler shall at all times have a board or sign affixed to his house, shop, cellar, or store, or in some conspicuous place near the same, with his name at large thereon, and the employment for which he is licensed, on pain of forfeiting twenty dollars.

"Sect. 8. If any innholder shall, when requested, refuse to receive and make suitable provisions for strangers and travellers, and their horses and cattle, he shall, upon conviction thereof before the Court of Common Pleas, be punished by a fine not exceeding fifty dollars, and shall also, by order of the said court, be deprived of his license; and the court shall order the sheriff or his deputy forthwith to cause his sign to be taken down.

"Sect. 9. No innholder or common victualler shall have or keep in or about his house, or other buildings, yards, and gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or other implements used in gaming, nor shall suffer any person resorting thither to use or exercise any of said games, or any other unlawful game or sport within his said premises, on pain of forfeiting ten dollars for every such offence.

"Sect. 10. Every person convicted of using or exercising any of the games aforesaid, in or about any such house or

building of an innholder or common victualler, shall forfeit ten dollars.

"Sect. 11. No innholder or common victualler shall suffer any \*person to drink to drunkenness or excess in his premises, nor suffer any minor or servant, travellers [\*507 excepted, to have any strong drink there, on pain of forfeiting five dollars for each offence.

"Sect. 12. If any innholder or common victualler shall trust or give credit to any person for liquor, he shall lose and forfeit all the sums so trusted or credited, and all actions brought for such debt shall be utterly barred; and the defendant in such action may plead the matter specially, or may give it in evidence under the general issue.

"Sect. 13. If any common victualler shall keep open his house, cellar, shop, store, or place of business on any part of the Lord's day or evening, or at a later hour than ten of the o'clock in the evening of any other day of the week, and entertain any person therein by selling him any spirituous or strong liquor, he shall forfeit for each offence ten dollars.

"Sect. 14. When any person shall, by excessive drinking of spirituous liquors, so misspend, waste, or lessen his estate as thereby either to expose himself or his family to want or indigent circumstances, or the town to which he belongs to expense for the maintenance of him or his family, or shall so habitually indulge himself in the use of spirituous liquors as thereby greatly to injure his health or endanger the loss thereof, the selectmen of the town in which such spendthrift lives shall, in writing under their hands, forbid all licensed innholders, common victuallers, and retailers of the same town, to sell to him any spirituous or strong liquors aforesaid for the space of one year; and they may in like manner forbid the selling of any such liquors to the said spendthrift by the said licensed persons of any other town to which the spendthrift may resort for the same; and the city clerk of the city of Boston shall, under the direction of the mayor and aldermen thereof, issue a like prohibition as to any such spendthrift in the said city.

"Sect. 15. The said mayor and aldermen, and said selectmen, shall, in the same manner, from year to year, renew such prohibition as to all such persons as have not, in their opinion, reformed within the year; and if any innholder, common victualler, or retailer shall, during any such prohibition, sell to any such prohibited person any such spirituous liquor, he shall forfeit for each offence twenty dollars.

"Sect. 16. When the said mayor and aldermen, or selectmen, in execution of the foregoing provisions, shall have pro-

hibited the sale of spirituous liquors to any such spendthrift, if any person shall, with a knowledge of said prohibition, give, sell, purchase, or procure for him in behalf of said prohibited person, or for his use, any such spirituous liquors, he shall forfeit for each offence twenty dollars.

"Sect. 17. The commissioners in the several counties may license, for the towns in their respective counties, as many \*508] persons to \*be innholders or retailers therein as they shall think the public good may require; and the mayor and aldermen of the city of Boston may, in like manner, license innholders and retailers in the said city; and the Court of Common Pleas in the county of Suffolk may, in like manner, license innholders and retailers in the town of Chelsea; and every license, either to an innholder or retailer, shall contain a specification of the street, lane, alley, or other place, and the number of the building, or some other particular description thereof, where such licensed person shall exercise his employment; and the license shall not protect any such person from the penalties provided in this chapter for exercising his employment in any other place than that which is specified in the license.

"Sect. 18. The mayor and aldermen of the city of Boston may license, for the said city, as many persons to be common victuallers as they shall think the public good may require; and every such license shall contain such a specification or description, as is mentioned in the preceding section, of the street or other place, and of the building where the licensed person shall exercise his employment; and the license shall not protect him from the penalties provided in this chapter for exercising it in any other place.

"Sect. 19. All licenses to any innholder, retailer, or common victualler shall expire on the first day of April in each year; but any license may be granted or renewed at any time during the preceding month of March, to take effect from the said first day of April, and after that day they may be granted for the remainder of the year, whenever the officers authorized to grant the same shall deem it expedient.

"Sect. 20. Every person, who shall be licensed as before provided in this chapter, shall pay therefor to the clerk of the city of Boston, the clerk of the Court of Common Pleas for the county of Suffolk, or to the clerk of the commissioners of the respective counties so licensing said person, one dollar, which shall be paid by said clerks to the treasurers of their respective counties for the use of said counties; and such persons shall also pay twenty cents to the use of the said clerks respectively; and no other fee or excise whatever shall

be taken from any person applying for or receiving a license under the provisions of this chapter.

"Sect. 21. Any license to an innholder, retailer, or common victualler may be so framed as to authorize the licensed person to sell wine, beer, ale, cider, or any other fermented liquors, and not to authorize him to sell brandy, rum, or any other spirituous liquor; and no excise or fee shall be required for such a license.

"Sect. 22. The clerk of the commissioners in the several counties shall seasonably, before the time for granting licenses in each year, transmit to the selectmen of every town within the county a list of the persons in such town who were licensed as innholders or retailers the preceding year.

"Sect. 23. No license shall be granted or renewed to any person, unless he shall produce a certificate [\*509 from the selectmen of the town for which he applies to be licensed, in substance as follows, to wit:—We, the subscribers, a majority of the selectmen of the town of \_\_\_\_\_, do hereby certify that \_\_\_\_\_ has applied to us to be recommended as (here expressing the employment, and a particular description of the place for which the license is applied for) in the said town, and that, after mature consideration had thereon, at a meeting held for that purpose, at which we were each of us present, we are of opinion that the petition of said \_\_\_\_\_ be granted, he being, to the best of our knowledge and behalf, a person of good moral character.

"Sect. 24. Any person, producing such certificate of the selectmen, shall be heard, and his application decided upon, either on a motion made orally by himself or his counsel, or upon a petition in writing, as he shall elect.

"Sect. 25. If the selectmen of any town shall unreasonably neglect or refuse to make and deliver such a certificate, either for the original granting or the renewal of a license, the person aggrieved thereby may apply for a license to the commissioners, first giving twenty-four hours' notice to a majority of the said selectmen of his intended application, so that they may appear, if they see fit, to object thereto; and if on such application it shall appear that the said selectmen did unreasonably neglect or refuse to give the said certificate, and that the public good requires that the license should be granted, the commissioners may grant the same.

"Sect. 26. All the fines imposed by this chapter may be recovered by indictment, to the use of the county where the offence is committed; and when the fine does not exceed twenty dollars, the offence may be prosecuted before a jus-

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tice of the peace, subject to the right of appeal to the Court of Common Pleas, as in other cases.

"Sect. 27. When any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court or justice before whom the trial may be had.

"Sect. 28. All prosecutions, under the provisions of this chapter, for offences committed in the city of Boston (excepting where the fine exceeds twenty dollars), may be heard and determined in the Police Court, subject to the right of appeal to the Municipal Court; but the said Police Court shall not have power, in any such case, to sentence any person to imprisonment, except as provided in the preceding section.

"Sect. 29. Any person, licensed under the provisions of this chapter, who shall have been twice before convicted of a breach of any of the said provisions, shall thereupon, in \*510] addition to the \*penalties before provided, be liable to a further punishment, by imprisonment in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had."

*Acts of 1837, Chapter 242.*

**"An Act concerning Licensed Houses, and the Sale of Intoxicating Liquors.**

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:—

"Section 1. No licensed innholder, or other person, shall sell any intoxicating liquor on Sunday, on pain of forfeiting twenty dollars for each offence, to be recovered in the manner and for the use provided in the twenty-sixth section of the forty-seventh chapter of the Revised Statutes.

"Sect. 2. Any license to an innholder, or common victualer, may be so framed as to authorize the licensed person to keep an inn or victualling-house without authority to sell any intoxicating liquor, and no excise or fee shall be required for such license: Provided, that nothing contained in this act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted.

"Sect. 3. Any person who shall have been licensed according to the provisions of the forty-seventh chapter of the Revised Statutes, or of this act, and who shall have been twice



convicted of a breach of this act or of that chapter, shall, on such second conviction, in addition to the penalties prescribed for such offence, be adjudged to have forfeited his license.

"Sect. 4. Any person who shall have been three times convicted of a breach of this act, or of the forty-seventh chapter of the Revised Statutes, shall, upon such third conviction, in addition to the penalties in this act and said chapter provided, be liable to be imprisoned in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had.

"Sect. 5. The secretary of this Commonwealth shall cause a condensed summary of all laws relating to innholders, retailers, and licensed houses to be printed for the use of this Commonwealth, and he shall supply the county commissioners for the several counties, and such other officers as by law are authorized to grant licenses, with the same; and the said commissioners, or other officers, whenever they grant any license, shall furnish each person so licensed with one copy of said license laws, to the end that such person may know to what duties, restrictions, and liabilities he is subjected by law."

[Approved by the Governor, April 20, 1837.]

\*A conviction having taken place under the indictment upon these statutes, the defendant filed several [\*511 exceptions, of which it is material to notice only the following:—

"2. It appeared upon the trial that some of the sales charged in the indictment were of foreign liquors, and his Honor directed the jury that the license law of this Commonwealth applied as well to imported spirits as to domestic, and that this Commonwealth could constitutionally control the sale of foreign spirits by retail, and that said law is not inconsistent with constitution or revenue laws of the United States. To this ruling also the defendant excepts."

The court below allowed this exception, together with all the others, upon which the case was removed to the Supreme Judicial Court. But that court overruled the exceptions, and ordered judgment to be entered upon the verdict.

*Mr. Hallett*, the counsel for Thurlow, then applied for, and obtained, a writ of error to bring the case to the Supreme Court of the United States, upon the following allegation of error, viz.:—

"That the several acts of the legislature of Massachusetts concerning licensed houses and the sale of intoxicating liquors, and especially the acts which are hereto appended

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and set out as part of the record in the said cause, upon which said judgment was founded, and also the opinion and judgment of said Supreme Judicial Court of Massachusetts, in the application and construction of said acts to the sales of imported foreign liquors and spirits by the said Thurlow, are repugnant to, and inconsistent with, the provisions of the constitution, treaties, and laws of the United States, in so far as the said acts, and the construction thereon by the said Supreme Judicial Court of Massachusetts, prohibit, restrain, control, or prevent the sale of imported wines and spirituous liquors, by retail or otherwise, in the said State of Massachusetts, and are therefore void."

Upon the writ of error thus issued, the case came up to this court.

It was argued in January, 1845, by *Mr. Choate* and *Mr. Webster*, for the plaintiff in error, and *Mr. Huntington*, for the State. Being ordered to be reargued, it was now argued by *Mr. Webster* alone, for the plaintiff in error, and *Mr. Davis*, for the State.

*Mr. Webster* opened the case. The best mode of presenting his views of the points which arose will be, to reprint the brief filed by himself and *Mr. Choate* in the former argument. It was as follows:—

The plaintiff in error, a citizen of the United States, living in Massachusetts, was convicted, under the Revised Statutes of that State, ch. 47, and the statute of that State of 1837, ch. 242, of sales of foreign spirits, made in 1841 and 1842, without a license. He seeks to reverse the judgment, upon the general ground that those statutes are repugnant to constitutional acts of Congress, and to the constitution of the United States; and contends,—

\*512] \*1st. That they prohibit even the importer of foreign spirits from selling them in the bottle, keg, or cask in which he imports them, either for consumption at the place of sale, or for carrying away; and are therefore unconstitutional, within the case of *Brown v. Maryland*, 12 Wheat., 419.

2d. That they are void, as being repugnant to the legislation of Congress, in their application to purchasers from importers, of whom the plaintiff is one; and hereunder he submits the following analysis of his argument.

1st. The statutes of Massachusetts are not auxiliary to, coöperative with, and merely regulative of, the legislation of Congress, which admits foreign spirits to importation under

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prescribed rates of duty, but are antagonistical to and in contravention of it, since they seek to diminish and discourage the sales of imported spirits to a greater degree than the legislation of Congress seeks to do it, upon the ground that the policy of Congress in this behalf is an erroneous policy.

To maintain this, the object and operation of the Massachusetts statutes, and the policy and the principle of constitutional power upon which they proceed, are to be considered.

Without a license, no one can sell, in a single instance, spirits to be used on the premises of the vendor, and no one can sell them for the purpose of being carried away, in a less quantity than twenty-eight gallons, which must be bought and removed all at one time.

The result, therefore, is, that without a license no one can sell spirits to be used, or to be carried away for use, since no one purchases for use so large a quantity as twenty-eight gallons to be carried away at one time.

Without a license, therefore, no one can sell at all by retail; and the retail trade in spirits, the sale of spirits for use, is suppressed.

2d. No one is entitled to a license, or can exact it, whatever be his character or fitness to trade.

No court or person is required to give a license. A tribunal called county commissioners, chosen by the people of the counties, may, if in its judgment the public good requires it, grant licenses; but even in such case is not required to grant them.

For the last six years none have been granted in the county of the plaintiff's residence, containing more than one hundred thousand inhabitants.

This withholding of licenses is no fraud on the Massachusetts statutes, but in perfect conformity with them.

In conformity with the law, then, all sales of spirits for use may be totally prohibited in Massachusetts.

These laws design to do just what can be legally, and without defrauding them, done under them.

They design, then, to restrain all sales of spirits for use; and they do this upon a general principle of policy, to wit: that such sales, for such purpose, by whomsoever made, are a public evil.

\*The difference, therefore, between them and all laws of mere policy, of quarantine, health, harbors, [\*513 storage of gunpowder, and the like, is, that those laws are auxiliary to, in aid and furtherance of, coöperative with, the

congressional legislation, while these deny its policy, and thwart and restrain its operations.

These statutes do not confine themselves to providing for suitable persons, places, and modes of selling foreign spirits, so as to secure the largest amount of traffic in the most expedient and prudent manner; but they mean, substantially and effectually, to put an end to the traffic.

The plaintiff in error, therefore, will discuss these laws, as if they did, in terms, prohibit all persons who buy of importers from reselling, since they do substantially so operate; and they assert a principle of power broad enough to go to that extent.

The general question, therefore, is this. Is a State law, prohibiting purchasers of spirits from importers to resell, on the ground that, for moral, medical, economical, or other reasons, the public good will not be promoted by such sale, repugnant to the acts of Congress, and to treaties authorizing importations of such spirits?

These sales were in 1841, and subsequent. The acts of Congress are, 1832, ch. 227, 4 Stat. at L, 583; 1833, ch. 55, 4 Id., 629; 4 Id., 25; 3 Id., 310.

These authorize importations in casks of fifteen gallons.

2d. What is the extent of the effect of an act of Congress authorizing importations?

1. Regarded as a license to, or contract with, the importer, communicating a right to sell, according to the view in *Brown v. Maryland*, 447, what is its extent?

The plaintiff contends that it would be repugnant to, and in fraud of, the license, either to ordain that no one shall buy of the importer, or to ordain that no one, having bought, shall resell, because either prohibition would totally defeat the license itself. The license is a license to carry the article to market, to trade in it, to have access with it to the consuming capacity of the country.

The grounds on which Congress legislate, in passing such an act, and the just expectations and reasonings of the importer, prove this.

The interception of the article in the hands of the first buyer, on its way to a market, excludes it from market, and shuts the importer from the country as really as if he were prohibited to sell.

2. Regarded as Congressional legislation, an act authorizing importations of spirits is a legislative determination that the foreign article may properly, and shall, enter into the consumption of the country, and be sold in the interior market thereof; and the Massachusetts statutes are intended to

contravene that determination, upon a directly opposite view of policy.

3. Congress has the constitutional power to determine, on general grounds of policy, what foreign articles shall enter into the \*consumption of the country, and be sold in the domestic market, and to what extent; and it exercises this power by an act laying duties. It determines that all which can be introduced and sold under such a rate of duties shall be, and the power of the States is merely auxiliary, coöperative, and regulative, securing proper persons by whom the traffic shall be conducted, but not discountenancing and discouraging the traffic itself. That power these statutes transcend.

It may be proper, also, in this connection, to reprint the abstract of the argument of *Mr. Hallett*, upon the same side, to show the reasons given for the doctrine sustained by the counsel for the plaintiff in error. *Mr. Hallett's* abstract was as follows:—

Are the laws of Massachusetts concerning the sale of imported wines and spirits constitutional and valid?

We contend they are not, because,—

1. No State can prohibit, by wholesale or retail, the sale of merchandise authorized by a valid law of Congress, or by treaties, to be imported into its markets; the retail sale being as indispensable to the object of importation, viz. use and consumption, as the wholesale.

2. The laws of the United States nowhere recognize any distinction between the wholesale and retail of imported merchandise, as connected with the right of the importer to introduce such merchandise, for use and consumption, into the markets of the United States.

3. Every concurrent or other power in a State is subject in its exercise to this limitation, that in the event of collision, the law of the State must yield to the law of Congress, constitutionally passed. *New York v. Miln*, 11 Pet., 102; *Commonwealth v. Kimball*, 24 Pick. (Mass.), 259.

4. If Congress has the power to regulate a subject-matter, a State cannot interfere to oppose or impede such regulation. The general government, though limited, is supreme as to those objects over which it has power. *Martin v. Hunter*, 1 Wheat., 304; *Cohens v. Virginia*, 6 Wheat., 384; *Prigg v. Pennsylvania*, 16 Pet., 539.

5. The commerce which Congress may regulate is something more than traffic. It is every species of commercial intercourse between the United States and foreign nations,

and among the several States. "These words [regulate commerce] comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and another to which this power does not extend." *Gibbons v. Ogden*, 9 Wheat., 189, 198, 194.

6. The exercise of the power of a State to regulate its internal commerce must not conflict with, and cannot control, the power of Congress to regulate foreign commerce, and commerce among the States. The internal commerce \*515] on which a State can act, \*independent of a law of Congress affecting the same, must be trade, or dealing in articles not connected with the operation of a valid law of the United States. It must be "completely internal," local, and not connected with the United States government, in the exercise of its power to regulate commerce, and to lay and collect duties and imposts.

7. "The power [of the United States] to regulate commerce, must not terminate at the boundaries of the State, but must enter its interior. The power is coextensive with the subject on which it acts." *Brown v. Maryland*, 12 Wheat., 446.

8. If a State, under the power of regulating her internal commerce, can exclusively regulate or control (to the extent of prohibition) commerce in imported merchandise, up to her boundaries, or the instant it shall pass, in bulk, from the hands of the importer, she can thereby exclude foreign commerce, and deny her markets to foreign nations.

9. If a State has no such power of prohibition, she cannot empower her officers or agents to do what she cannot do herself, viz., prohibit internal commerce in foreign merchandise. Suppose the legislature of Massachusetts, instead of conferring this power of prohibition upon county commissioners, to be exercised in their uncontrolled discretion, should retain it, to be exercised by herself; it would be unlawful legislation, and collision of a State law with a law of the United States.

10. The laws of Massachusetts, of which the plaintiff in error complains as unconstitutional, are, in respect to commerce and trade in this description of imported merchandise, a law of prohibition, because they assume to provide for licenses to persons to sell, and then empower the agents they create to refuse all such licenses, without cause; and it punishes all sellers in quantities less than twenty-eight gallons, without such license; and, in fact, no such license can be

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obtained. Both the intent and the operation of these laws are, therefore, prohibitory.

11. If it be said that it depends upon the administration of this law, whether it be constitutional or not, and therefore a law may be constitutional though its operation may be unconstitutional, the answer is, that a State cannot so frame a law as that under one sort of administration it is constitutional, and under another unconstitutional, and both operations be lawful, and thus the law be valid.

12. If a law of a State provides for and contemplates collision with a law of the United States, the former is invalid, and must yield whenever the collision arises.

13. The counsel for the Commonwealth of Massachusetts admits that the law complained of becomes prohibitory against this description of imported merchandise, whenever the public sentiment of a majority electing the county commissioners requires prohibition. If this be valid State legislation, then the power of Congress to \*regulate commerce in imported merchandise is subordinate to the disposition [\*516 of the legislature of a State to exclude it from their markets.

14. The laws of Congress make no distinction between commerce in imported wines and spirits and other foreign merchandise. A recognition of the power of a State to exclude the first from its markets, whenever public sentiment requires it, must embrace the like power in respect to all other descriptions of imports, whenever the public sentiment in a State demands its exercise.

15. There is no preëminence given to that class of State legislation denominated police laws over other laws, whenever they come in collision with the lawful exercise of a power of Congress; and in such case the latter, by the terms of the constitution, shall be the supreme law of the land.

16. The law of Massachusetts in question is not a health law against contagion or infection in the article imported; it aims to keep it out of the hands of the consumer, on the ground of its abuse in excess of use. Health laws may exclude all such portions or cargoes of an article of commerce as are infectious; but they cannot exclude a whole class of imported merchandise, on the ground that infected portions or cargoes of it have been, or may be, imported.

17. Infected articles of commerce may rightfully be excluded from passing the boundary of a State, and reaching the hands of the importer, as well as the consumer. But a State cannot (under *Brown v. Maryland*, 12 Wheat.) exclude imported wines and spirits, or any sound article of commerce, from reaching the importer; and this is an obvious distinc-

tion between health laws and a law of prohibition to cut off the transfer of a sound article from the importer to the consumer.

18. The point where regulation ceases and prohibition begins is the point of collision, and of unconstitutional operation, of a State law affecting foreign commerce. In this respect a State law becomes a law of prohibition when it punishes all who sell without license, and confers the whole power of licensing on agents, with express authority to withhold all licenses.

19. In any and all cases, the power to deny sale includes the power to prohibit importation; and the question of power is the same, whether exercised directly by the legislature, or indirectly by its agents thereto authorized.

20. The operation of the law of Massachusetts on foreign wines and spirits deprives imported articles of their vendible quality. This such law cannot rightfully do, for the whole course of legislation by Congress shows that the right to sell is connected with the payment of duties, and the right to sell must extend beyond the importer, or it is an inoperative right.

21. The argument on the other side is, that if the power to \*regulate commerce can follow the imported article, \*517] with its vendible quality attached, into a State, it can compel consumption by the citizens of that State. This confounds the mere commercial right to offer for sale with the power to force purchase. All the law of Congress requires in the markets of the United States is a right to sell and buy; and when this right ceases, commerce ceases.

22. The counsel on the other side further argues, that the State has a right to deny this commerce, whenever her citizens do not wish to deal in it. But if they do not desire to purchase, there would be no need of a prohibition of sale. The law of prohibition proceeds on the ground, that if commerce in this article were not denied, there would be such commerce; and therefore it directly interferes with the law of Congress regulating that commerce.

23. A State may pass all such laws as she pleases for the safety, health, or morals of her people, and may use whatever means she may think proper to that end, subject only to this limitation, that in the event of collision with a law of Congress, the State must yield. *Commonwealth v. Kimball*, 24 Pick. (Mass.), 363.

24. Now, Congress, by law and by treaties, authorizes foreign commerce with the States in wines and spirits. By the treaty of indemnity with France, in 1832, the wines of France



were "admitted to consumption in the markets of the United States." The law of Massachusetts shuts her markets against the fair and just operation of these laws and treaties of the United States, and renders them so far inoperative.

25. The general view as to the prohibitory provisions of the laws of Massachusetts in this matter, taken together, is, that it is a blending of two powers to be exercised at pleasure under the statute: one legitimate,—to regulate; the other unconstitutional,—to prohibit, whenever the public sentiment in the State comes up to that point.

26. Massachusetts assumes to abolish foreign commerce in her markets in imported spirits, on the ground of thereby preserving the health and morals of the people; but at the same time, in her internal commerce and exports, she encourages, without tax or excise, an annual manufacture by her citizens of 5,177,910 gallons of domestic spirits, which is one eighth part of the whole product of the United States in spirits distilled from molasses and grain.

27. Congress has not changed its policy in this respect, but Massachusetts has changed hers, in opposition to the laws of Congress. Until 1837, the laws of Massachusetts uniformly provided for the sale and consumption of wines and ardent spirits imported into her markets. The act of 1786, ch. 68 (1 Mass. Laws, 297), was in force with additional acts till 1832. By section fifteen, the general sessions were not to license more persons in any town than they shall judge necessary for refreshment of travellers, \*or are necessary for the public good, by which was meant the public convenience. Act of 1792, ch. 25, p. 417, required all persons to be licensed, on satisfactory evidence of fitness, and that such license will be subservient to the public good. Additional Acts, 1807, ch. 127; 1816, ch. 112; 1818, ch. 65.

The act of 1832, ch. 166, reduced the maximum to ten gallons, and provided for a new class, victuallers. The commissioners to license, as innholders and retailers, as many applicants as they shall decide the public good may require. The law now in force (Rev. Stat., ch. 47, 1835) altered this provision to power to county commissioners to license as many persons as they shall think the public good may require.

Then followed the declaratory act of 1837, ch. 242, that the commissioners might withhold all licenses in their discretion.

The act of 1838, ch. 157 (commonly called The Fifteen-gallon Law), made penal all sales of spirituous liquors less than fifteen gallons; licensed only apothecaries to sell for

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medicine and the arts, and punished the sale by them, if to be drank; and repealed all laws inconsistent with this act.

This brought up the question of prohibition. The act was contested in the courts of Massachusetts as unconstitutional, but was not decided there before it was repealed, in 1840, without any reservations. The Supreme Court of that State thereupon decided, in 1840, that the repeal revived the preëxisting laws, chap. 47 of Rev. Stat., and chap. 242 of 1837 (*Commonwealth v. Churchill*, 2 Metc. (Mass.), 118). Since then no licenses have been granted. The plaintiff's first sale in the case at bar was in May, 1841, and this case has been brought up on writ of error as soon as the laws of Massachusetts and the decisions of her highest court have established prohibition as the law of that State.

28. The law of Massachusetts comes in collision with the power of Congress over revenue, which is a supreme power, used as a substitute for taxation. With this view, the constitution requires that "all duties shall be uniform throughout the United States."

If Massachusetts, by her laws, can exclude one or more articles of import, she pays so much less revenue than other States that admit all. This makes the operation unequal so far, arising from the legislation of Massachusetts adverse to the power of Congress to collect revenue in all the States. Suppose the duty on foreign wines and spirits to be one fourteenth part of all the revenue, the States can cut that off, if this legislation is valid; and, by the same rule, all other sources to collect revenue are wholly destroyed.

29. So of the treaty-making power. The United States has power to reciprocate its markets with the markets of foreign nations; but if a State can shut its markets against any one or more of the articles admitted, by denying sale, the United States cannot in good faith perform any such reciprocal engagement.

\*30. The laws of Massachusetts, therefore, which, \*519] by their provisions, and their operation in conformity to such provisions, prohibit all commerce in wines and spirits in quantities under twenty-eight gallons, are repugnant to the constitution and laws of the United States,—

1st. In the power to regulate foreign commerce.

2d. In the power to collect revenue on imports into the several States.

3d. In the equal apportionment of taxes and duties in all the States; and,

4th. In the power to make treaties.

*Mr. Davis*, for the State. The following is a sketch of the argument, and shows the positions assumed and maintained by him for the defendant in error.

The broad ground assumed by the plaintiff's counsel is, that the statute of Massachusetts is unconstitutional, because it "prohibits, restrains, controls, or prevents the sale of imported wines and spirituous liquors, by retail or otherwise, in the State."

To make the policy of Massachusetts, in restraining an indiscriminate traffic in intoxicating drinks, intelligible, we must understand its history, and the state and condition of things when the constitution of the United States was made.

The court has often declared, that in a complicated system, which establishes two governments over the same people, it is necessary, in considering questions of power, to look into contemporaneous facts; that the objects designed to be secured by the federal constitution may be understood, and, if possible, carried into effect.

The context of the instrument is not alone to be regarded, but the whole machinery of government; and care must be taken, in carrying out the fundamental principles, that the purpose of the framers is not frustrated.

As the power of Massachusetts to make laws restraining traffic in intoxicating drinks is denied, I shall, as a preliminary step, briefly state the history of her legislation upon this subject, and point out the consequences which will follow if this doctrine is maintained.

The law of Massachusetts was revised in 1836; but acts similar in principle, and nearly so in detail, have existed for more than two centuries, and been enforced by her judicial tribunals. Ancient Charters, 135, 314, 433; Laws of Mass., 1786, ch. 68; Rev. Stat., ch. 47, and several other statutes.

The law, substantially as it now is, forbidding a sale without a license in less quantities than twenty-eight gallons, was made in 1786, and was in force when the federal constitution was ratified, and has, with immaterial modifications, remained so from that time to this.

From thence till this time, the revenue system of the United States has been in force; and the laws which are now supposed to conflict have during all that time [\*520 worked harmoniously together.

After a lapse of fifty-six years, it is now first discovered that the State is trenching upon the power of the United States, and impairing the revenue by restraining the sale of imported wines and spirits.

Let it be remembered, however, that the United States do

not and have not complained of any wrong done by the State; nor has any question ever been agitated in that quarter, in regard to the diminution of the revenue; which makes it quite apparent that no serious inconvenience is felt.

While, however, I admit the right of the plaintiff to appeal to this court, I must observe; that, although this long acquiescence may not prove the law of the State to be constitutional, it establishes the fact that it has produced no noticeable or sensible influence upon the revenue or the revenue power of the United States. It would seem, also, to be a clear indication that the federal government is not hostile to the policy of Massachusetts, or anxious to promote drinking to increase the revenue.

It also proves, that the State has at all times during its organization as a body politic considered restraint in the traffic of spirits as essential to the public welfare.

But the State is not an exception to other communities in this respect, but has followed out a principle which has been maintained and enforced through all ages among the civilized nations.

*Mr. Davis* then proceeded to prove, from historical authority, that the ancient Egyptians, the Greeks, the Romans, and the more Eastern nations did, through most periods of their existence, maintain rigid and severe restrictions upon the use of wine, and that excessive indulgence at all times was esteemed criminal.

He referred also to China, and the bordering nations, where abstinence from intoxicating drinks was enforced as a religious duty. He referred also to the Western nations of Europe, whose opinions and laws were equally condemnatory of excessive indulgence, and remarked that but one opinion prevailed through all ages.

He said, that the common law of England and this country frowned upon intemperance, and held it to be without apology; for, while mental alienation by the providence of God was a justification of crime, when it occurred by drink it was not; but the party was held answerable, because his insanity was occasioned by his own folly.

Even in the new settlement of Oregon, made up of people congregated from different parts of the earth, the sale and manufacture of spirits was forbidden by law.

But there was no occasion to multiply proofs of public opinion, for intemperance was everywhere deprecated and lamented; and had almost everywhere fallen under the condemnation of legal \*restraint; by enactments for that

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proved that there was a proneness in the human appetite to excess which requires control.

It should be observed, that the ancients were unacquainted with alcohol, and used wine in its simplest and most unobjectionable forms; while upon the moderns the double duty is devolved of contending against the demoralizing effects of both.

The train of evils which mark the progress of intemperance is too obvious to require comment. It brings with it degradation of character, impairs the moral and physical energies, wastes the health, increases the number of paupers and criminals, undermines the morals, and sinks its victims to the lowest depths of vice and profligacy.

In proof of this, there were in New York, in 1845, 26,114 paupers, 6,245 of whom were reduced to that condition by intemperance. In the same year there were in Massachusetts 14,308, and 6,740 were addicted to excessive drinking.

In the Sing Sing penitentiary, in 1845, there were 861 convicts, and 504 of these had been intemperate. The returns of other poor-houses and penitentiaries are equally startling.

These facts prove that intemperance is an evil of all-pervading magnitude, and that all ages and communities have set upon it the seal of disapprobation.

Such being its character, and such the evils which it engenders, the Colony, the Province, and the State of Massachusetts held it to be an imperative duty to check its progress by suitable restraint, and to promote sobriety and temperance by wholesome regulations.

Her law stood upon her statute-book when the federal constitution was made, and there it still remains.

No argument can make the fact clearer, that she has at all times esteemed legal restraint as indispensable to the public welfare.

Suppose, then, that the law of the State should be held unconstitutional, and she should be denied the power to legislate upon the subject; what consequences would follow?

It will appear in the progress of this inquiry, that the United States have no power to regulate the traffic in wines and spirits within the States; and if the State has no such power, then the right is abrogated.

Is not such a result hostile to the intent of all parties to the constitution? The framers did not intend it, and the States could not have contemplated it.

The United States are as much interested in the preservation of life, health, and morals as the States can be, and the motive to avert pauperism, crime, and profligacy must, with

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them, be equally persuasive. The policy and duty of the federal and State governments must obviously be concurrent, and cannot be arrayed in hostile attitude without violence to both.

\*522] \*Neither the United States, nor the State of Massachusetts, could, therefore, when making the constitution, have anticipated the abrogation of this power; and if it has been done, it is contrary to the intent of the parties. This is inferable, not only from what has been stated, but from the fact that these parties have moved on in their respective spheres for fifty-six years, in the exercise of their respective claims to power, without conflict and without entertaining a suspicion that the State has been enforcing laws without authority and in violation of right.

It would be a singular result, and one to be deprecated, if, in giving construction to the constitution, the court should arrive at a conclusion injurious both to the United States and the States; a result which both would deplore as hostile to their best interests, and subversive of the purposes which they had in view when they entered into the constitutional compact.

Nothing but a commanding necessity can sanction such a step, and it never will be taken unless under an imperiously pressing sense of duty.

With such facts and circumstances as these surrounding it, we come to the consideration of the question, whether the law of Massachusetts is constitutional.

The plaintiff in error assumes the affirmative, and must establish the fact that it is incompatible with, or repugnant to, the constitution and laws of the United States.

It will not be denied that the federal government has no powers except such as are granted to it and are enumerated in the constitution.

On the other hand, it is equally clear and indisputable, that the States retain in themselves all powers not so granted or prohibited by the constitution. This is an irresistible inference; but the States made it doubly certain, by declaring in an amendment the fact, in the most clear and explicit terms.

While, therefore, the United States hold the powers which are granted, the States hold those which are not granted or prohibited, and both are fully sanctioned and maintained by the constitution.

The plaintiff, therefore, must maintain that Massachusetts has, in making her law, exercised a power not reserved to her.

He makes it a question concerning commerce. He con-

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tends that the law, in effect, regulates foreign trade, the power to do which is confided to the United States.

The ground assumed is, that the United States authorize importations, and levy upon them a duty for revenue; that the right to sell is incident to the right to import, and cannot be controlled or regulated by the State in such a manner as to diminish the sales or to impair the revenue.

The constitution declares, that Congress has power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

\*These words give all the authority which the United States have over commerce. [\*523]

The power is manifestly limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. The grant covers these three kinds of commerce, and nothing more.

In this case, commerce with foreign nations alone is to be considered. The domestic commerce is necessarily excluded; for it is neither foreign, nor is it trade among the States, nor with the Indian tribes.

This inference is not only apparent from the language of the constitution, but is fully sustained by authority.

In *Gibbons v. Ogden*, 9 Wheat., 203, the court, in commenting on inspection laws, employ the following language:—"They form a portion of that immense mass of legislation which embraces every thing within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are component parts of this mass. . . . No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation."

Again, in the same case the court speak of the power to regulate the internal trade and commerce of a State as an acknowledged power of the State.

It is, therefore, judicially settled, that the power to regulate the internal commerce of a State is reserved to and resides in it.

Such being the partition of powers between the States and the United States, I come to the inquiry, What is the character of the law of Massachusetts? Upon what basis does it stand, and from what power or right in the State is it derived? And I shall contend that it is a regulation of the internal commerce of the State, having for its object the preservation of order, morals, and health, and intended to discourage in-

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temperance and to promote sobriety. And such being its general characteristics, I shall also contend further, that it falls within that class of laws generally called police regulations.

The trade intended to be regulated is completely internal, and spread over the whole territory of the State. That the regulation of such a commerce belongs to the State is evident, not only from the authority cited, but from the language of the court at page 195 of the same case. "The completely internal commerce of a State," says Chief Justice Marshall, "then, may be considered as reserved for the State itself."

The State has furthermore a right to provide for the health of its citizens by police regulations. In *Gibbons v. Ogden*, 9 Wheat., 205, \*the court say of quarantine and health laws,—[524] "They are considered as flowing from the acknowledged power of the State to provide for the health of its citizens"; again, at page 208, "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens," is spoken of as unquestioned.

It may, then, be assumed on authority which does not admit of doubt, that a State has a right to regulate its internal commerce, and to provide for the health and government of its citizens by suitable laws. That such regulations are considered by this court to be police laws will not be doubted.

These propositions are sustained by high authority. The State possesses the undeniable right to regulate its internal trade, and to maintain municipal or police regulations to protect and promote the welfare of the people.

That a law restraining an indiscriminate traffic in wines and spirits, and designed to protect life and health by promoting temperance and sobriety, is a police law cannot be questioned.

The law of Massachusetts being, then, a measure relating to a trade completely internal, and a police regulation, is, in all its aspects, founded on an acknowledged power which is vested in the State by the provisions of the constitution.

This being the highest source of authority, it would seem sufficiently to justify and maintain the law.

But it is contended that even this foundation may fail a State in cases of conflict; for the law of the United States is supreme, and must, in such cases, prevail against the admitted right of a State.

Our system is obviously complicated, because the federal and State governments extend over the same territory, and people, and act upon the same persons and things. For



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example, foreign commerce is destined to become internal, and internal to become foreign. This flux and reflux from jurisdiction to jurisdiction brings the laws into contact, and the jurisdictions impinge upon each other.

This opens the question, Which in such cases shall prevail? The answer has been, that federal power in such cases is paramount and supreme. This is sometimes said to be an axiom to which State authority must bow in submission. But if we admit the authority, the question still remains, How far does this implied supremacy extend over the acknowledged powers of the States? Is it unlimited, and must a State yield to its touch whenever felt? No one, I believe, will urge the doctrine to this extremity.

The decisions of this tribunal will establish the fact, that the supremacy of federal power in cases of conflict has boundaries and limits, and that the action of State laws derived from powers reserved to the States is never unconstitutional until it becomes incompatible with, or repugnant to, the federal laws.

But, what is incompatibility? What is repugnancy? This inquiry often presents perplexing considerations, because no fixed, determinate rule can be laid down [\*525] by which cases can be tested; but each case, as it comes up, is left to be decided by the facts which surround it. Whenever State power touches that of the United States, whoever may profit by it is anxious to make out a case of incompatibility or repugnancy, and thus every seeming conflict is liable to become a matter of judicial investigation; and there is a constant disposition manifested to expand the power of the general government, and to contract that of the States.

We are not, however, without authority which throws no inconsiderable light on this inquiry. The learned commentator upon the constitution, 1 Com., 432, after an examination of all the authorities, sums up the result:—"In cases of implied limitations or prohibitions of power [and this is one] it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme inconvenience, leading irresistibly to the same conclusion."

Under this rule a State may exercise its power in any way or form, and to any extent, if its action upon federal power does not amount to manifest incompatibility or direct repugnancy. The fact of incompatibility or repugnancy must not be equivocal, but clear and certain. In cases of incompatibility, it must be apparent that the laws of the United States and a State supposed to be in conflict cannot stand together,

or be reconciled or harmonized with each other. The whole doctrine of repugnancy and incompatibility is confined within these narrow limits. It is applied, in fact, only to cases where the power of a State so acts upon a power of the United States as substantially to subvert or defeat it. In such cases only has the supremacy of the federal law been maintained over constitutional State power. The rule clearly implies, in all cases of doubt, that the power of the State is to prevail against this implied right of supremacy. Even potential inconvenience is not to be regarded, but must be tolerated as long as it falls short of incompatibility or repugnancy.

It requires but little consideration of the subject to justify these cautious limits of power; for if the laws of the State must recede before those of the United States whenever they come into contact, it is manifest that State power would be in imminent danger of being obliterated; for, as State power yields, federal power must follow and press upon it. The dangers which beset the exercise of power by sovereignties whose limits of authority are not ascertainable cannot be more forcibly described than in the language of the late chief justice, in *McCulloch v. Maryland*, 4 Wheat., 316, 430. After stating the grounds upon which the decision rested, the learned judge says:—"We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from repugnancy between a right in one government to pull down \*526] what there is an \*acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve;—we are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree the abuse, of power." The court congratulated itself upon having discovered the limits of sovereignty without resorting to the implied right of supremacy on the part of the United States, which necessarily involved the most conflicting and dangerous considerations.

This case is but one among the many proofs given by this court of a uniform and anxious desire to give full and free scope to the powers of the respective governments, and to harmonize, if possible, their action, without asserting the supreme authority of the federal constitution over the acknowledged powers of the States. This can never be done when it subverts the lawful power of the States without creating alarm, and impairing the stability of the Union.

The cautious and almost reluctant manner in which this court have applied this doctrine of supremacy over acknowledged State power is manifest in many of its decisions, which

prove incontestably its disposition to avoid such conflict if possible.

It has already been shown from *Gibbons v. Ogden*, "that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," originate from powers which are reserved to the States. What is the character of those laws, and how are they executed? The answer will show how far the power of a State may be carried without incompatibility or repugnancy.

They deal with foreign commerce, asserting, as will appear by their provisions, absolute control over it for certain purposes which are connected with the public welfare and safety.

The inspection laws authorize the detention and examination of merchandise, and the imposition of marks which denote its true character, and often affect its value.

Quarantine laws direct possession to be taken of vessels arriving, and require them, with their crews, passengers, and cargoes, to be detained, and forbid intercourse with the shore.

The health laws carry with them a similar authority, and provide not only for detention, but for the purification, and, if necessary, the destruction of the cargo.

In *Brown v. Maryland*, 12 Wheat., 443, the court observe, "that the power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the States." They add, also, that "the removal or destruction of infectious or unsound articles is undoubtedly a branch of the same power."

These laws interfere directly with foreign commerce, asserting a right to control men, vessels, and cargoes, before a voyage is completed.

\*Harbour laws, ballast laws, &c., are of a similar character, and hence it has been supposed that they [\*527 are regulations of foreign commerce.

But this court repel this conclusion, and maintain their constitutionality, because they are police regulations of the States, and derived from a right reserved to make and execute such laws; and are not, therefore, regulations of foreign commerce, though, for the purposes of protecting life, health, and property, they necessarily deal with it. The court go farther, and also maintain, that such laws are not incompatible with or repugnant to the laws of the United States which relate to foreign commerce, and therefore no objection exists to the exercise of such power by the States over foreign commerce.

It is manifest from these authorities, that State power, and especially police power, may be exercised upon matters with-

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in the jurisdiction and under the control of the United States without incompatibility or repugnance. The protection of life, health, and property demand it. The right to do it is acknowledged, and cannot be questioned, unless its exercise defeats or subverts the power of the United States; then, and in such cases only, it is viewed as incompatible or repugnant.

This brings the doctrine of repugnancy and incompatibility, when asserted against the rightful power of a State, into narrow limits; and it is believed that no case has yet occurred before this court, in which the power of the United States, because it is supreme, has been extended by implication so as to defeat or overrule the acknowledged authority of a State, unless concurrent powers constitute an exception.

It is further manifest, that the right of a State to make police laws is unquestioned, because, as the court declare, it is among the reserved rights. This power, I have shown, has been and is exercised in a great variety of ways, and in many forms, over foreign commerce.

It is obvious, therefore, that it constitutes the boundaries of sovereignty, and is paramount to the power of the United States in all cases, except where it defeats or subverts the granted powers of the United States.

It is further obvious, that the court will not consider a State law, made in the exercise of lawful authority, and in the exercise of a power belonging to the State, a law regulating foreign commerce, though it may act upon and influence such commerce.

It is also obvious, that the court has never denied, but, on the other hand, has always admitted, the right of a State to make police regulations, to protect life, health, and the property of the citizens, and the right to extend this protection against the dangers incident to foreign commerce has uniformly been distinctly recognized.

It can neither be admitted nor maintained that the United States, \*under a general power to regulate foreign  
\*528] commerce, has a right, without restraint, and in defiance of State powers, to import disease and pestilence, to fill the country with infamous persons, or to debauch the public morals. Such is not the design of the constitution; and if such a right shall be successfully asserted, it will soon prove that the federal and State governments cannot exist together.

Such are the restraints which oppose the extension of federal power, in cases of apparent conflict, on the ground that it is supreme.

A careful examination of the many decisions will prove

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that the court has anxiously studied to fix, as far as circumstances will permit, definite boundaries to sovereignty, leaving them to depend as little as possible upon questions of incompatibility or repugnancy.

The police laws of the State have uniformly been maintained, on the ground that the States have a right to make them, and this right is not to be questioned, although in the exercise of it the laws and power of the United States are and must be affected, or the remedy against alarming evils be incomplete. It seems to me that the court have practically, and for the best of reasons, placed such laws on the ground that they emanate from exclusive and independent powers enjoyed by the States.

This position has been gradually approached, with a watchful solicitude at every step taken in advance.

In *New York v. Miln*, 11 Pet., 102, a reëxamination of the authorities was made, and the grounds of the opinion there delivered are stated with great clearness (p. 139). After discussing the principles so ably laid down in *Gibbons v. Ogden*, the learned judge says:—"We do not place our opinion upon this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these, that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States; that, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the happiness, the safety, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may perhaps be more properly called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

This authority defines the great question of boundary between the sovereignties with an accuracy which cannot be mistaken, so far as regards police laws.

The powers not conceded or prohibited by the constitution remain in the States unchanged, unaltered, and unimpaired, and as fully in force as if no constitution had been made. [\*529]

None of those powers which relate to municipal legislation  
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or internal police have been surrendered or restrained, but are complete, unqualified, and exclusive.

If they are complete, the State has the whole and the sole enjoyment.

If they are unqualified, they remain as they were, unaltered and unchanged.

If they are exclusive, there can be no participation in them by another.

The inference is irresistible, that such powers are independent of and paramount to the constitution of the United States, and therefore not subject to any supreme power of the federal government in cases of conflict.

This is but carrying out the provisions of the instrument, as they apparently stand.

It is manifest, that the laws of the two governments must meet and mix, because the jurisdictions commingle, and the question is, Did not the framers of the constitution intend it should be so?

When they made that instrument, and gave to the United States the control over foreign commerce, and reserved to the States the police powers, they knew that life and health and property in the States must be provided for; and they knew then, as well as we do now, that it could not be done without an interference with foreign commerce. Did they not intend, then, when they granted this power to the United States, that it should be held and enjoyed subject to the exercise of these reserved powers in the States?

Such at least is the effect of this decision, if language has any meaning; and this case does little more than carry out the principles which had been previously maintained in practice.

The police laws had in fact everywhere been maintained against the supreme power of the United States, notwithstanding this obvious interference.

The pressure of this principle of supremacy was forced upon the States with such zeal, and the supposed cases of incompatibility became so frequent, that the exigencies of the times demand a positive rule to the extent that it could be safely established.

The step was taken eleven years ago, and what inconvenience has been experienced? In what has the power of the United States been impaired or disturbed? Who has sensibly felt any change? Whose interests have not been well provided for, and safely protected? Much has been said and sung by the theorists; but the laws have been well harmonized, and the public have been well satisfied.

In regard to constitutional principle, this case is decisive of the one under consideration, as it admits the authority of a State to \*maintain police regulations in regard to its internal affairs, whatever may be their effect or influence upon the laws of the United States. [\*530

All this is conceded when the power of the State is declared to be complete, unqualified, and exclusive. *Commonwealth v. Kimball*, 24 Pick. (Mass.), 365; *Pierce in error v. N. H.*, Law Rep., Sept., 1845.

I have thus far, in speaking of constitutional power, assumed that the law of Massachusetts is a police measure, made in good faith, to regulate the traffic in intoxicating drinks.

This has, however, been questioned, on the supposition that it is, in fact, a regulation of foreign commerce.

It becomes necessary to look into its provisions, to ascertain whether they are adapted to the professed object, or designed to cover up a specious fraud.

The act requires all retailers, who sell in less quantities than twenty-eight gallons at a time, to first obtain a license from the proper authority.

The retailers are tavern-keepers, and small grocers, living wherever there is travel and population.

The design of the law is manifestly to prevent tippling and disorder, by promoting temperance and sobriety; and, whether it be a regulation of trade or police, or both, relates to affairs completely internal.

Is this a suitable matter to engage legislative attention? Does such a traffic demand restraint, or does the legislature employ it as a pretext to regulate foreign commerce?

I have already dwelt sufficiently on this point, and have proved that intemperance is everywhere deprecated and deplored, that the world has raised its voice in remonstrance against an indiscriminate traffic in wines and spirits, and it seems to me that if health, morals, usefulness, and respectability are worthy of public consideration, and merit protection against an insidious foe, the legislature would be criminally guilty in wholly disregarding a matter of such obvious importance; and that the exercise of the power needs no justification.

But are the provisions of the law suited to the professed object? The evident end in view is to place the trade in safe and suitable hands, in the custody of those who will use without abusing it, and mitigate, instead of aggravating, the evils incident to it.

To carry this principle out, the law authorizes the county

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License Cases.—Thurlow v. Massachusetts.

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commissioners, who are elected by the people, and supposed to be an exponent of public opinion, to license as many inn-holders and retailers as the public good requires. Can any one desire more?

If suitable persons are to be selected, the mode is probably as unobjectionable as any which can be devised; but if no selection is to be made, as is contended, and all persons are to have a right to demand a license, a law, with such provisions, would cease to be a regulation, and had better be abolished.

\*531] \*Another feature of the law is, that it makes no discrimination between foreign and domestic wines and spirits, but deals with all alike. This would seem to furnish sufficient proof that it has no special reference to the importing trade, but aims at a general regulation, and is designed to promote temperance and not to regulate foreign commerce.

When these facts are taken in connection with the anti-quity of the policy, no reasonable doubt can exist as to the good faith and sincerity of purpose in the legislature.

But it is objected to the law, that the commissioners may so exercise their discretion as to impair or defeat the revenue.

This argument supposes that judicial officers will abuse their authority. But it is not a question as to the manner of using power, but of right.

A discretion is reposed in all judicial tribunals, where facts are to be ascertained as the foundation of a judgment. In all such cases, the law may be perverted; but the abuse is proof of misconduct in the officer, and not of the unconstitutionality of the law.

Whether an applicant for a license is a suitable person, and whether the public good requires the grant to be made, are facts to be ascertained, which must depend upon evidence; and the questions cannot be decided without an exercise of judgment.

It is difficult to comprehend how a selection of suitable persons, or of suitable places, can be made, without the exercise of so much discretion as such a decision implies. There is, in fact, no intermediate ground between this and indiscriminate traffic.

But it is further objected to this system, that its whole tendency is to reduce consumption, and to diminish the revenue.

The State has a right to regulate its internal trade, and to maintain police laws. No condition is annexed to this right, which requires the State to exercise the power without impairing the revenue upon imports. The law may have some remote effect on the revenue; but what law or principle of



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the constitution forbids it? There can be no repugnancy or incompatibility till the powers of the United States to raise revenue is substantially defeated.

Of such a state of things there is no proof. On the contrary, the license laws have been in operation for fifty-six years with the revenue system, and no sensible or noticeable effect has been produced; not enough even to make it a topic of discussion.

If the whole revenue from this source were dried up, it could have little tendency to defeat or control the financial power of the United States, which is too broad and ample in resources to be materially affected by any such legislation.

But the argument proves too much,—it denies to a State the right to make a law which tends to impair the revenue of the United States.

The right of taxation is concurrent, and may be and is exercised \*by both governments upon the same persons and property. This is an undeniable right in a State, and, [\*582 yet it is manifest that it cannot be exercised without impairing the resources of the United States.

Slaves are taxable property, and cannot be emancipated without diminishing the resources of revenue; but will it be contended that a law of emancipation is unconstitutional for that cause?

So, too, laws which establish market-days, and forbid sales upon the Sabbath, have a tendency to restrain indiscriminate traffic.

Without, however, pursuing this reasoning, which might be easily extended, I deny that a diminution in the consumption of wines and spirits raises any presumption that the general revenue is impaired by the process. On the contrary, my belief is, that, if the facts were to undergo the severest scrutiny, it would turn out quite otherwise. It has never been maintained that a free use of wines and spirits has any tendency to promote public prosperity, nor is it denied that an excessive use is manifestly prejudicial. There can be no doubt, that where abstinence or severe temperance prevails accumulation is increased and the means of subsistence enlarged. These ordinarily go to support existence, and, creating a greater expenditure in the necessities and comforts of life, contribute in other forms to the revenue, giving a gain instead of a loss.

But it is urged that the commissioners may press their powers so far as to exclude consumption; and if they should, the revenue would probably suffer in no respect; as the general prosperity would be improved.

But, aside from this consideration, I apprehend there is no objection to such a step. Police laws may be carried to any extent which the public welfare demands. If the health, the morals, and the welfare of the public demand the exclusion of an evil, there is a right to shut it out, regardless of revenue and of private interests. This power may and should be exercised just to the extent which the public exigency demands.

Such is the long-established practice in regard to health. If the cargo of a vessel is infected and dangerous, it is destroyed; and all revenue and private interests are sacrificed for the public safety. Gunpowder is required to be landed and stored in a way which saves life and property from jeopardy. Ballast is required to be deposited where it does no mischief to navigation. The publication, by sale or otherwise, of obscene books, prints, pictures, &c., is an indictable offence.

Yet all such laws are undeniably constitutional, and are maintained as police regulations on the ground that the public health, morals, and property demand protection. The right to give this protection has never been successfully questioned; and it is evident that legal provisions in such behalf must be such as to meet the emergency. If excessive indulgence in the use of intoxicating drinks be an evil, and no one will question it, it is the right of the legislature to \*533] guard \*against it by wise and prudent regulations; and such regulations obviously fall within the principle which sustains the laws referred to. If the evil be such as to demand stringent provisions, reaching to exclusion, there is no constitutional objection to such legislation.

But it is further urged, and some reliance seems to be placed upon it, that the county commissioners of *Essex* do in fact suppress sales by refusing to grant any licenses.

If such were the fact, the presumption would be, that they have done it because their duty required it, unless the contrary is proved. In *New York v. Miln*, the court pronounce pauperism to be a moral pestilence; but pauperism is but one of the many plagues which follow intemperance.

In this case, however, there is no proof of such an exercise of power by the commissioners. It does not appear that the plaintiff in error, or any one else, ever applied for and was refused a license, and an alleged abuse of power cannot be presumed in the absence of all proof. Before the plaintiff can lay any foundation for just cause of complaint, he must prove that he applied, being a suitable person for such an

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employment, and was refused, when the public good demanded that a license should be granted.

He makes no such case on the record, but places the law itself on trial, instead of the administration of it, and relies upon the proof which it contains on its face of its unconstitutionality.

The commissioners are not and cannot be placed on trial by this record, and whenever their conduct shall be arraigned in a proper manner, I have no doubt they will justify their decisions, whatever they may be.

Another objection which has been urged against the law of Massachusetts is hostility to the policy of the United States.

What is the policy of the United States on this subject? Are we to infer, without proof, that the United States are not equally interested with the State in promoting good morals, in protecting health, in preventing the waste of property and the increase of crime? How can the United States have less at stake than the State, or be less interested in cherishing the virtues which make a good population, or in discouraging the vices which lead to the opposite result?

On what ground can the promotion of sobriety and temperance be hostile to the policy of the United States? Is it their purpose to debauch public morals, to encourage a lavish waste of property, and to multiply crimes, from the mercenary consideration of deriving revenue from a process of degradation?

Does the policy of the United States war with the best interests of society, and are they anxious for revenue at such sacrifices? What proof is there of such an unnatural state of things?

It is supposed, that the United States countenance an indiscriminate traffic, because they permit wines and spirits to be imported, \*and lay upon them a duty. This naked [\*534 fact is alleged to be evidence of a declared purpose to raise the utmost revenue which can be realized, and that a law interfering with this design is unconstitutional?

If this be so, then the law of Massachusetts which punishes habitual drunkenness is unconstitutional, for it diminishes consumption; and the law which authorizes the appointment of guardians over such persons must share the same fate, as well as all other laws which in any way regulate trade so as to impose any restraint upon it.

But there is more decisive and satisfactory evidence of the policy of the United States than such remote, uncertain inferences.

In 1838, Congress invited the army to abandon the use of  
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the spirit ration, and offered by law a substitute to all who would accept it, in sugar and coffee; and the same principle has been carried into the navy, and has met with approbation in both branches of the service.

In 1813, Congress passed a law, 3 Stat. at L., 73, in which there is a clear and decisive expression of opinion. This law imposed internal taxes, and the collectors are authorized to grant licenses to sell at retail wines, distilled spirits, or merchandise, "provided always that no license shall be granted to any person to sell wines, distilled spirituous liquors, or merchandise as aforesaid, who is prohibited to sell the same by any State."

Here is a clear expression of the views of Congress in regard to State legislation and State policy. It shows the deference and respect which it considered to be due to so important and delicate a subject, by conforming its legislation to that of the States, and adopting this policy. The law is now repealed, because the tax is abolished, but the opinion loses none of its weight or importance from that consideration.

Again; it has been suggested that the revenue laws, which permit wines to be imported in bottles, and brandy in kegs of fifteen gallons, are evidence that Congress intended to confer a right to sell in such quantities, and therefore the law of Massachusetts is repugnant to them.

This argument rests on the supposition that Congress has the right to regulate the internal trade of a State, while it is admitted that States alone possess this right. If, therefore, such were the intention of Congress, the acts would be void for unconstitutionality; for the federal government cannot claim a power denied to it.

But there is no reason for believing that those provisions were made with reference to any such object. They relate wholly to the custom-house and to exportation. Such is known to be the history of the fifteen-gallon kegs, and the same is doubtless true of wines.

It is a regulation of convenience, and designed to keep the  
\*535] \*import trade in a form to prevent smuggling and  
frauds, either in importation or exportation.

These considerations go to maintain the conclusion, that the law of Massachusetts was made in good faith, and for the purposes indicated by it; that it is derived from powers distinctly reserved to the State, and is a regulation both of the internal commerce and police; that its provisions are adapted to the purposes for which they are designed; that it is not a regulation of foreign commerce, or of the revenue system,

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and does not affect either unlawfully; and that it is not hostile to the policy or interests of the United States.

It is evident, also, that it is sustained as a police measure by the whole current of authority antecedent to, as well as by, the case of *New York v. Miln*.

The plaintiff in error next contends, that an importer of wines and spirituous liquors has a right to sell them in the same vessels in which they are imported. He then alleges, that wines may be imported in bottles, and brandy in kegs of fifteen gallons, while the law of Massachusetts prohibits the sale in less quantity than twenty-eight gallons, without a license.

For the purposes of this case I might concede the position, for the plaintiff is not indicted for selling wines in the original bottle, or brandy in the original keg; but for dealing out spirituous liquors by retail in small quantities, from a quart or pint to a gallon.

The record does not show that he is an importer and vender in the original package or vessel, or that he ever had wine in bottles or brandy in kegs of fifteen gallons. If, therefore, the original importer has such a privilege, this plaintiff can make no pretension of right to it.

But from what authority is this right to sell in the original vessel derived?

The laws of the United States do permit the importation of wines in bottles, and brandy in kegs of fifteen gallons. Formerly, brandy could not be brought in, in vessels of less capacity than ninety gallons; but the quantity was reduced, as is well known, to favor the export to Mexico, where so large a quantity could not be taken into the interior upon pack-horses.

But if these laws were intended, as is supposed, to regulate the internal trade of the States, they could not be sustained, as Congress has no power or right to regulate that traffic. They have, however, never been understood to have any such bearing; but to be what they purport, regulations of imports and exports.

But the case of *Brown v. Maryland*, 12 Wheat., 419, is supposed to give some support to this position.

A law of Maryland forbid importers and venders in the original package the right of selling without first obtaining a license, for which fifty dollars were exacted. Brown, being such an importer and vender, violated the law, was prosecuted, and the case finally decided by this court. [\*536

The court held, first, that the law of Maryland was a revenue act imposing a tax;

Secondly, that such a tax, imposed upon the importer as such, and before any right of sale could be exercised, was a duty on imports, and expressly prohibited by the plainest terms of the constitution, which forbids the States the right to lay duties on imports;

Thirdly, that such a duty, so levied, is a regulation of foreign commerce, and for that reason also unlawful.

The decision goes no further than to deny the power of a State to impose a tax upon the importer, as such, before he has made a sale; because this is, in effect, a duty on imports.

There is nothing in the case which questions the right of a State to exercise police power over imports and importers, for any of the great purposes to which such legislation is directed.

The principles which govern the decision are laid down with a clearness which cannot be mistaken.

The exemption from taxation is limited to the importer, and to a sale by him in the original package. The mischievous consequences of a more extended exemption were foreseen and guarded against, in order to leave the internal affairs of the States untouched.

The court, to prevent all misapprehensions, declare that a sale of such goods, a breaking up of the packages, or an appropriation of the articles to use, or any similar act, mixes the goods with the mass of property in the State, and extinguishes the privilege.

The exemption is, therefore, limited to the importer and vender by the original package, and is denied to all others.

The authority, consequently, furnishes no support or countenance to the case under consideration, as the plaintiff was neither an importer or vender by the original package.

But if the plaintiff were an importer, instead of a retailer, the case of *Brown v. Maryland* would furnish no justification for a violation of the law of Massachusetts.

The law is not a revenue act, but a police measure. It imposes no tax upon imports, and therefore does not fall within the prohibitory clause of the constitution.

The difference between the laws is this: the State of Maryland exercised a power prohibited; while the State of Massachusetts founds its legislation upon one which is conceded.

The health laws, quarantine laws, ballast laws, &c., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it. If I am right, therefore, in assuming that the traffic in wines and spirits is a suitable object for regulation, the power of the

State cannot be successfully questioned by importers and venders in the original package or vessel.

\*If, then, the plaintiff had proved all the facts which have been assumed, they would avail him nothing. [\*537

All the important questions which have been raised in the case have now been considered, imperfectly, no doubt; but, having been brought to the notice of the court, they will receive the consideration which their importance deserves.

The course of reasoning pursued is intended to establish the following positions:—

1. That the traffic in wines and spirituous liquors has, in the public judgment, as expressed through ages and centuries, demanded restraint and regulation.

That, the United States having no powers to impose such restraint, if it be denied to the States, the right is abolished.

That such a result would be alike injurious to both parties, and desired by neither.

That, under such circumstances, the court would be justified in declaring the law void only by commanding necessity, and that no such emergency exists.

2. That, in the partition of powers between the federal and State governments, the rights of the former are granted and enumerated in the constitution, while the latter retain all powers not granted or prohibited by that instrument.

That the grant of a right to regulate foreign commerce excludes the right to regulate domestic commerce, which is left in the States.

That the right to make police regulations is also left in the States.

That the law of Massachusetts belongs to these classes, and is derived from lawful, constitutional power vested in the State.

3. That, if the right of a State to maintain police laws is complete and unqualified, there can be no constitutional conflict with the laws of the United States, as the power is absolute and supreme.

But whether this be so or not, the right of the State to regulate its internal traffic and police is acknowledged, and can never be questioned, except in cases of manifest incompatibility or direct repugnancy, and there is no proof that the law of Massachusetts has any such action, effect, or influence on the powers or laws of the United States.

4. That the United States having a right to regulate foreign commerce is bounded by the point where such commerce becomes internal, and cannot follow it for the purposes of regulation or control after it becomes subject to State

authority, without usurping the constitutional power of the State.

5. That the plaintiff in error was indicted and convicted for retailing spirits without a license, being neither an importer nor vender of such spirits in the same vessels and quantities as imported.

That if he had been such an importer and vender, it would avail him nothing, as the question before the court does not relate to taxation, or fall within the prohibitory clause of the \*538] constitution, but \*regards the right of the State to regulate its internal commerce and police after the work of the United States is completed, so far as foreign commerce is concerned, and their power exhausted.

6. That, in whatever aspect this case is viewed and considered, the law of Massachusetts cannot be drawn into doubt by the severest scrutiny; nor can the power of the United States be made to reach or control it without a manifest invasion of the rights reserved to the State by the terms of the constitution.

The counsel then closed his remarks by adverting to the importance which the question had acquired by being long a subject of earnest controversy and agitation. Many prosecutions were now pending, and, the public being anxious to be relieved from this state of suspense, he hoped the matter would be brought to a speedy and final issue. What that issue would be, it did not become him to anticipate; but he would venture to give assurance that the people of Massachusetts would acquiesce in it, and give their support to the law as expounded by this tribunal, to which they looked at all times with the deference and respect due to those who settle the greatest of all questions, the boundaries of power.

*Mr. Webster*, in reply, said that he agreed with the learned counsel who had just concluded his argument in many of the positions which he laid down. It was true that the retail trade should be regulated, and that intemperance was a great evil. Even if he differed from the State on the policy of these laws, he claimed neither for himself nor the court a power to review her decision upon that point. The State was the sole and uncontrolled judge of her policy. But the question here was one of authority, and not policy. Has Massachusetts the power to pass such laws? Whether she has or not, it is useless to inquire into her motives for passing them. It is admitted by all, that the United States have power to regulate commerce; and it is also admitted by all, that the States have certain police powers. So far, there is no difference of opin-



ion. But the learned counsel says that these powers stand upon equal ground, both resting on sovereignty; and his inference is, that, in case of conflict, one has as much right to stand as the other. Here our difference of opinion commences. We say that these powers do not stand upon equal elevation, but, if there be a conflict between them, the State law must yield; because the constitution says that acts of Congress, passed within the scope of the constitutional power of Congress, are the supreme law of the land. There can be no conflict. The State law must recede. It has been so settled by this court. In 3 Wheat., 209, 210, it is so laid down, in the very terms which I use. Let us see, therefore, whether both laws, that is to say, the State law and the acts of Congress, can stand. What are they?

The former laws of Massachusetts made it obligatory to grant \*licenses. The phrase was "authorized and directed" to grant, &c. But under the act of 1837 they [\*539 may be withheld altogether, and the fact is, that for some years past none have been granted. Now there is no difference, in substance, between an absolute prohibition of licenses by law, and a grant of power to another body to withhold them. In both cases, the same result is produced by the action of the same authority, namely, the State. What is this result? It is, that no person can sell liquor in a less quantity than twenty-eight gallons.

What are the laws of Congress? They are, that brandy can be imported in casks of fifteen gallons. 4 Stat. at L., 235; Id., 373.

What is the right of the importer after complying with these laws? Does the right to sell follow the right to import? This court has already answered the question. In 12 Wheat., 433, it is said,—“There is no difference between the power to prohibit sales and the power to prohibit importation. None would be imported if it could not be sold.” There is no exemption, by the law of Massachusetts, in favor of the importer himself. He cannot sell without a license. All are included within the law. It was said by the counsel on the other side, that the United States have not complained of any infringement upon their authority. But this makes no difference. Cases are always brought here by individuals who complain of a violation of their rights. It was also said, that Congress was bound to preserve and enforce the observance of moral duties. But if Congress does not prohibit a particular act, the inference is, that it does not think proper so to do. It remains to be shown that penalties are the best mode of enforcing temperance. Father Matthew does not

think so. The States may pursue this policy if they choose, provided they do not interfere with vested rights. There are two things which Massachusetts has not done, both of which it may be wished that she had:—

1. She has not presented a memorial to Congress to prohibit the importation of liquor in small quantities.

2. She has not prohibited the domestic distillation of spirits. In 1840, five millions of gallons were distilled within her limits. Of this we do not complain. But if she has a right to pass the law now under consideration, she has also a right to exempt domestic distilled spirits from its operation. What, then, will be the condition of things? It will be, that her restrictions will be placed exclusively upon that article which Congress have said shall be subject to no restriction.

\*540] *\*Joel Fletcher, Plaintiff in error, v. The State of Rhode Island and Providence Plantations, Defendant in error.*

This case was very similar to the preceding one. The principal difference was in the admission of the fact, that the brandy, for the sale of which the plaintiff in error was indicted, was duly imported into the United States, the duty upon it paid, and that it was purchased by Fletcher from the original importer.

The following admission of facts was filed in the cause:—

“It is admitted, in the above case, that the liquors alleged in said indictment to have been sold by the defendant, in violation of the act of this State, entitled, ‘An act enabling town councils to grant licenses for the retailing strong liquors, and for other purposes,’ was brandy, the growth, produce, and manufacture of the kingdom of France; which said brandy was duly imported into the United States at the port of Boston, in the district of Massachusetts, for the purpose of sale in the markets of the United States, and the duties levied thereon by virtue of the act of Congress of the United States, approved the 30th day of August, A. D., 1842, entitled, ‘An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,’ were duly paid to the collector of the said port of Boston; that said defendant bought said brandy of the importer thereof for the purpose of sale; and, in pursuance of said purpose, did, at the times alleged in said indictment, sell the same, at said Cumberland, without

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license first had and obtained from the town council of the town of Cumberland.

"It is further agreed that the town council of said town of Cumberland have refused to grant any license for the year ensuing the Thursday next following the first Wednesday in April, A. D., 1845, for retailing strong liquors in any quantities, having been instructed by the electors of said town, in town meeting assembled, not to grant any licenses for the purpose aforesaid."

It is not necessary to recite the whole of the laws of the State, as they were very similar to those of Massachusetts. The following one will be sufficient:—

.. An Act in Addition to an Act, entitled, 'An Act enabling the Town Councils to grant Licenses, and for other Purposes.'

"It is enacted by the General Assembly as follows:—

"Section 1. No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this State, when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year."

\*Fletcher was indicted upon two counts. The first [\*541 was for selling strong liquor, to wit, rum, gin, and brandy, by retail, in a less quantity than ten gallons, without license; and the second, for selling, and suffering to be sold, in his possessions, ale, wine, and other strong liquors, by retail, &c., &c.

Upon this indictment he was convicted, and the case brought from the Supreme Court of Rhode Island to this court. The assignment of errors by the counsel of Fletcher was as follows:—

*Assignment of Errors.*

"United States of America, Supreme Court:—*Joel Fletcher, Plaintiff in error, v. State of Rhode Island and Providence Plantations, Defendant in error.*

"On a judgment of the Supreme Court, begun and holden at Providence, within and for the county of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph

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M. Blake, Attorney-General of said State, is prosecutor, and the said Joel Fletcher is defendant, the said Joel Fletcher, upon a writ of error upon said judgment, returnable to the next term of the Supreme Court for the United States, to be begun and holden at the city of Washington, in the District of Columbia, on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five, assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said State of Rhode Island and Providence Plantations, and the construction thereof by the said Supreme Court, the following, to wit:—That the judgment rendered in the Supreme Court of said State in this case, it being the highest court of law and equity of the said State in which a decision could be had in said case, should be reversed, for the reasons following, viz.:—That the act of the General Assembly of said State of Rhode Island and Providence Plantations, entitled, ‘An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,’ and the act entitled, ‘An act in addition to an act, entitled, An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,’ and appended hereto and set out as a part of the record in the said cause upon which said judgment was founded, and also the opinion and judgment of said Supreme Court of said State of Rhode Island and Providence Plantations, in the application and construction of said acts to the proof submitted in said cause, are void, the same being repugnant to that clause of the eighth section of the constitution of the United States which provides,—‘That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the \*542] common defence and general \*welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States’; and are also repugnant to that clause of the said eighth section of said constitution which provides as follows:—‘The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes’; and are also repugnant to that clause of the tenth section of said constitution of the United States which provides as follows:—‘No State shall, without the consent of Congress, lay any imposts or duties on imports and exports except what may be absolutely necessary for executing its inspection laws,’ and the acts of Congress, in pursuance of the aforesaid several clauses of said constitution of the United States now existing in full force, which objections were, at the trial of said cause before

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said court, taken by the said Fletcher in his defence, and were overruled by said court. There is error also in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said State of Rhode Island and Providence Plantations against the said Joel Fletcher; whereas, by the law of the land, the said judgment ought to have been given for the said Fletcher against the said State; and the said Joel Fletcher prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

JOEL FLETCHER,  
By JOHN WHIPPLE, and  
SAMUEL AMES,  
*His Attorneys.*"

The cause was argued by *Mr. Ames* and *Mr. Whipple*, for the plaintiff in error, and *Mr. R. W. Greene*, for the State.

*Ames* and *Whipple*, for the plaintiff in error, read and commented on the various acts of the General Assembly of the State of Rhode Island, in relation to the licensing of taverns, ale-houses, and the like, and the sale of spirituous liquors therein, commencing in the year 1647, and coming down to the year 1824, for the purpose of showing, that, from the earliest period in the history of the colony to the last-named period in the history of the State of Rhode Island, her policy had been uniform on this subject, and similar to that of most Christian and civilized countries, and of all the Colonies and States of the Union,—that is, to license and regulate the sale of spirituous liquors, that it might be consistent with the preservation of good order, and with the Christian virtue of temperance, and not to inhibit it, in enforcement of the Mahometan rule of abstinence. They showed that the licenses granted by the municipal authorities of the various towns of Rhode Island for the keeping of taverns and the retailing of strong liquors had been a source of revenue to the towns and to the State, to aid in the maintenance of the police of the State, and insisted, that, in the fair construction of the acts empowering the town officers to grant them, the words "*may grant*" were legally construed "*must or shall grant*," according to the well-known general rule of so construing the word "*may*," when used in a public act or municipal charter to impart an authority to public officers,

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in the exercise of which the public interest or private rights were concerned; and that the practice of the authorities of the towns of Rhode Island had always concurred with this well-known rule of legal construction. To this point they cited, *Blackwell's case*, 1 Vern., 152; *Rex v. Barlow*, 2 Salk., 609; S. C., Carth., 293, 294; *King v. Inhabitants of Derby*, Skin., 370; *Magdalen College case*, 3 Atk., 166; *King v. Mayor and Jurats of Hastings*, 1 Dowl. & Ry., 149; *Newburgh Turnp. Co. v. Miller*, 5 Johns. (N. Y.) Ch., 101, 118, 114; *Ex parte Simonton*, 9 Port. (Ala.), 390.

They then showed, that, under the influence of what is called the temperance reform, a new principle had been introduced into the legislation of Rhode Island on this subject, which, after numerous fluctuations, had, in January, 1845, settled the law, if indeed it was settled, in the shape of the act of January, 1845, which in substance forbids in any town the sale of all strong liquors in less quantities than ten gallons, without license first had from the town council of the town, and provides, that if, on the day appointed for the election of town officers, a majority of the electors of a town voting on the subject shall vote to grant, or not to grant, licenses for the ensuing municipal year, the town council of the town were irrevocably bound during the year to obey the instruction.

They admitted that a law regulating the sale of strong liquors under a license for the sale, even though a bonus was required for the license, was valid: but that a law like the present, in its purpose, end, and operation, as well as in its form, substantially and practically prohibitory of the sale, was, in its application to the case at bar,—in which the liquor sold was brandy imported from France, upon which, under the act of Congress of 1842, entitled, “An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,” the duties had been regularly levied and paid,—void, as repugnant to that act, both as a revenue measure upon which the expenditures of the government of the United States were based, and as a regulation of the commerce of the United States with France.

Though they maintained the exclusive power of Congress, under the constitution, to regulate commerce with foreign nations, as well as among the States and with the Indian tribes,—as required by the necessities of the country at the \*544] time of its formation and adoption \*as new,—to preserve proper commercial relations abroad, and for the prosperity and peace of the several States; as well as that an

adequate revenue might be derived from duties on imports, they waived the discussion of the exclusiveness of this power as an abstract power in Congress, in the present case, for a double reason:—because Congress had exercised it in the subsisting act of 1842, and because the act of Rhode Island could in no proper sense be said to be an exercise of the power to regulate foreign commerce.

They admitted that an act of a State, to come in conflict with the exclusive power of Congress to regulate foreign commerce, when not exercised, must of itself be an exercise of that power; but maintained, that any law pertaining to the mere police of a State might come in conflict with a commercial regulation of Congress; and, if it did, must, so far as it did, yield to the law of Congress, as the supreme law of the land, when passed in pursuance of the constitution. They were not aware, until the doctrine had been boldly advanced by the counsel for Massachusetts, in the preceding case,—tried with this by order of the court,—that it had been “a growing opinion,” and still less, that by the decision of this court in *New York v. Miln*, 11 Pet., 139, 141, it had become “the settled law” of this court and of the land, that in all such cases of conflict the rule of the constitution was reversed, and that the law of Congress became subject to the law of the State, as to the supreme law of the land, and that the clause of the constitution asserting the supremacy of the constitution, and of the laws and treaties of the United States made under it, applied only to the case of concurrent powers; nor did they so understand that case. They maintained that the doctrine thus announced was little short of absurdity, since it admitted the supremacy of the law of Congress in the case of concurrent powers,—in the exercise of which the governments of the States and the government of the United States enjoyed, as it were, a joint empire, and where, from the very fact that the powers were concurrent, they could never, in a constitutional sense, be said to conflict, and so there was no room for the supremacy in question,—and denied the supremacy of the United States in the legitimate exercise of its exclusive powers, making the United States the slave of the States in its own exclusive dominions, under a constitution which declared, without limitation or reserve, that its just power should be supreme, not only over the laws, but even the constitutions, of the States. Upon this question they appealed from conservative Massachusetts to democratic Virginia, and cited the 44th Paper of the *Federalist*, p. 183, Gideon's edition, in which Mr. Madison, in commenting upon the clause of the constitution in question,

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concludes his defence against the only objection that was made to it—that it rendered the constitution, laws, and treaties of the United States supreme over the constitutions of the States—with this statement of the \*result if this \*545] supremacy had not been given:—"In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." In this case, a supremacy over the constitution, laws, and treaties of the United States was claimed for every, even the most petty, police law of a State, or even a town or city, when that constitution and those laws and treaties were made supreme over the constitution of the State by which, or under the authority of which, the police law was passed. They commented upon the case of *New York v. Miln*, for the purpose of showing that the general language there used by Mr. Justice Barbour in delivering the opinion of the court, from which the strange doctrine in question had been inferred, should, according to the rule in this respect laid down by Mr. Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat., 399, be restrained to the case before the court, which, by the decision of the court, involved no conflict of the powers of the government of the State of New York with those of the government of the United States, and, by the illustrations given of the meaning of the language, could be fairly applied only to cases where no conflict existed. Upon this point, they cited also the opinions of Mr. Chief Justice Taney, and of Mr. Justice McLean, in the subsequent case of *Groves et al. v. Slaughter*, 15 Pet., 505, 509, members of the court at the time the opinion in *New York v. Miln* was delivered, and concurring in that opinion, for the purpose of showing that they could not have understood the language in question in the sense contended for.

(Mr. Justice Wayne here declared his entire dissent from the general opinions expressed in the language in question, and even declared that he had no recollection that such language was in the opinion of the court in that case at the time it received his concurrence.)

They concluded upon this point, that if any persons really held the doctrine in question, upon the supposition that it was necessary for the maintenance of certain peculiar institutions of some of the States, which, though guaranteed by the constitution, were at war with its whole spirit, as well as



with the principles of the Declaration of Independence, which the constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of "a blunder,"—in the opinion of a great but unprincipled politician, in such matters, always worse than "a crime." The clauses in the constitution guaranteeing these institutions were an anomaly in it. It was better, then, to treat those institutions and every thing fairly relating to them as anomalous,—to be governed by peculiar rules,—than, by converting an anomaly into a general rule, to \*pervert the whole spirit, and invert the whole order, of the constitution, and, by thus stripping the general government of all its powers, deprive the States, and especially the smaller States, of all the rights and protection guaranteed by the United States. They who were willing, and all sensible people were, to stand by the compromises of the constitution, would do much to redeem the pledge thus given for them; but it was both unjust and impolitic to require this of them.

They came, then, to the only real question in the cause, whether the law of Rhode Island in question was in conflict with the tariff law, as it was called, of 1842.

The act of Congress admits brandy by name to sale and consumption in the States, at one dollar per gallon, both for revenue and as a regulation of commerce with France; and they cited *The Federalist*, Pap. 12, p. 46, to show that no inconsiderable revenue was originally anticipated from spirits.

Congress might have prohibited the importation of brandy, as it did in the same act the importation of obscene prints, &c.; but it licensed the importation, and, by necessary intendment, the sale and consumption, of brandy by the above act, as the United States did, by the treaty of July 4, 1831, with France, the admission of wines at certain rates "to consumption into the States." Right or wrong, Congress had said, by the act in question, to the foreign producer, to the importer, retailer, consumer, pay us one dollar per gallon, and you shall have brandy from France for sale and consumption. Upon this offer all parties had acted, produced, imported, bought of the importer, and in the price of the article had paid the duty; and after this it was something worse than illusory, that we should be told that the importation only was licensed, or at most the sale in the original package or cask, and that the States might destroy the whole value of the import by prohibiting its sale and consumption, and thus effectually countervail the legislation of Congress in one form, which it was agreed they could not do in another.

This would be to make the constitution deal in mere forms and names, and not in things.

The law of Rhode Island proceeds upon this formal distinction. It says to Congress, you may license the importation of brandy, but not a drop of it shall be sold or consumed in any town of ours, if the voters of the town choose to prohibit it. You may expect revenue from it; but so far as our citizens are concerned, not a penny shall they pay. We forbid it by law.

The law in question is most skilfully devised to effect its purpose. It does not in form prohibit altogether the sale and consumption of foreign brandy, but only really and substantially. It says, you shall not sell in less quantities than ten gallons, and might as well have said in less quantities than twenty-eight gallons, or one hundred gallons, or one \*547] thousand gallons. It cuts off, strikes out, one link \*between the importer and consumer, and might as well destroy, and does thus practically destroy, the whole chain; for there can be no importation without sale, no wholesale without retail,—and these are arbitrary terms,—no retail without consumption.

In case of a direct prohibition of sale like this, there can be no metaphysical subtilty necessary to ascertain the degree of conflict between the State law and the law of Congress; whether it amounts to “a possible or potential inconvenience,” or “an extreme inconvenience,” or “a direct repugnancy,” or “plain incompatibility.” Incidental diminution of consumption from licenses, taxation, charters of temperance societies, prohibitions of sales to drunkards, children, slaves, &c., is another thing. Here the prohibition is both direct and substantial. To prohibit and prevent the sale of the imported article is both the purpose and effect of the law, and upon the ground that, by the act of 1842, Congress had licensed what was wrong.

The very test proposed by this court in *New York v. Miln*, 11 Pet., 143, is thus met precisely by the law in question.

It is said that the sale of liquor is immoral. Then let Congress prohibit, not seek a revenue from its importation. Let reform in this respect begin constitutionally with Congress; for in no cause, however sacred, can a State be said to act rightly, when acting unconstitutionally.

In application to any other article of commerce between the United States and foreign countries, or between the States, but liquor, it would be admitted that such a law was void,—as to rice, sugar, cotton, tobacco, flour, cotton goods, French silks, wollen cloths, &c. What is the ground for dis-

tion? It is as much within the police power of a State to pass laws to encourage or compel household manufactures, or the raising of certain agricultural products, by forbidding the sale of cotton, woollen, or silk fabrics, in less quantities than ten, or twenty, or one hundred pieces,—or of cotton, rice, flour, tobacco, by forbidding the sale of these articles in less quantities than ten, twenty, or one hundred bales, casks, bundles, or barrels,—as to prevent the use of imported liquor, by forbidding the sale in less quantities than ten, twenty, or one hundred gallons; and yet all will agree that a law like that supposed would be clearly void, in its application to such articles imported from foreign countries, or another State. Let some casuist mark the difference between the cases if he can.

The law in question is no more entitled to be called “a police law” than the law supposed, if there was any thing in such a mere name. Any law relating to the internal government or police of a State or city is a police law, whether civil or criminal, and it would be absurd to contend, that constitutionally one police law was more sacred than another, since the State or city is the sole judge of the necessity or fitness of either, provided always, that in passing such laws it does not interfere with those constitutions or [\*548 laws which control its powers of legislation.

They contended that the fact, that the sale in the case at bar was not of the article in the cask in which it was imported, could not affect the question; the notion suggested *obiter*, not adopted, by Mr. Chief Justice Marshall, in *Brown v. Maryland*, that the importation licenses the sale only in the original package, being false in theory, and destructive to the constitutional powers of Congress in practice. As the governments of the United States and of the States operate upon the same men and things, within the same territory, at the same time, it is obvious that all material barriers between them are broken down, and that in general we must look for the boundary line of the two jurisdictions in the relation and condition of the men and things upon which they operate. This is certainly true of the power to tax imports, or things which have been imported, and of the prohibition to tax exports, or things to be exported. It is obvious, that the States may and do every day tax residents for their personal property, whether in the form in which it has been imported, and even lying in the custom-house, or in which it is to be exported, on the wharf, or in the vessel, just as if the import or export was confused with the mass of property in the State; and no one deems such a tax as a tax upon imports or exports, in

the sense of the prohibition of the constitution, or in any proper sense whatever. Nor would such a general exercise of the taxing power by the United States upon all personal property of its citizens, including imports and exports, be a tax or duty upon imports or exports, but merely a tax upon personal property, and upon the import or export as such property. Any discriminating tax, however, upon a thing imported, as such, at any time, in any form, either of the law or the import, would certainly be a tax or duty upon imports forbidden to the States; and any discriminating tax or duty upon a thing to be exported, as such, would be a duty upon exports forbidden to the United States, and to the States, except under the control of Congress, for the purpose of executing their inspection laws. There is nothing in the nature or form of an article which makes it an import, only something in its history; there is nothing in the nature or form of an article which makes it an export, only something in its destination; and if any thing be specifically taxed as imported, or to be exported, it is a tax upon an import, or upon an export, within the letter and spirit of the constitution. Once allow that the States may levy discriminating duties upon things imported from foreign countries, or other States, the moment they have lost their original form, or have been taken out, as they must be for sale and use, of the package or cask, and the commercial power of Congress, and the revenues of the United States from this source, are lost together. Once allow that the United States may levy discriminating duties \*549] upon things to be \*exported from the States, as such, in any form or package, or in the process of growth or manufacture, and it is obvious that the agriculture and manufactures of the States are directly at the mercy of the general government. This "package notion," as it is called, is one of those vain but natural efforts of the mind to attach itself to something material to rest upon, even in matters which do not admit of such helps and rests.

The taxing power is a sovereign power, necessary for the support of government, and never in its nature or effect treated as a repugnant power. *Providence Bank v. Billings*, 4 Pet., 514, *Groves v. Slaughter*, 15 Pet., 505. When exerted by the State over personal property in general, including imports, it cannot affect foreign commerce, or the revenues of the United States, since it bears equally upon all articles, and thus keeps their relative value the same. To become mischievous, either constitutionally or practically, to foreign commerce, a tax law must discriminate as to the subjects of it.

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This, however, is not true of prohibitory laws, like the law in question. If practically such a law forbids the sale, destroys the vendible character of an imported article, which constitutionally it cannot do, it does not help the law in relation to such articles, that it also destroys the vendible character of the like article manufactured in the State, which constitutionally it may do. It is void *pro tanto* imports, in any form or shape.

There is also this plain distinction between such a law and an ordinary license law: that the latter does not, like the former, destroy the vendible character of the article, but, admitting this, restricts the power of sale to certain selected persons licensed to sell the article; and practically the difference is just as great as the different terms *license* and *prohibition* import.

No one denies the right of the States to regulate the sale or punish the improper use of any article, domestic or imported, within their territories, under such customary and proper restrictions as substantially leaves to the article its vendible character. It is the taking away of this character from imported brandy, upon which the duties have been levied and paid, of which we complain in this case.

Thus, the States may and do prohibit sales of all articles on the Lord's day, in enforcement of a divine command; of liquor to drunkards, children, &c., to prevent riot and intemperance; and they tax and license hawkers and peddlers, and auctioneers of all articles, and retailers of things dangerous in their use, to prevent fraud, regulate domestic trade, raise revenue, and insure public safety and social order. All this, so far from injuriously affecting the sale of things, aids and assists it, by making it safe, regular, profitable, and consistent with the well-being of the community. The same remark applies to quarantine laws, and sanitary \*regulations [\*550 in general. They may delay the infected ship, or stop the infected person, or even destroy the infected article; yet who does not see that in this very way they aid foreign commerce, by making it safe to the community which carries it on, and promote traffic in imports, by preventing all danger in handling, using, or consuming them? Even these, however, may be so needlessly restrictive, or, still worse, totally prohibitory in their character, as obnoxiously to interfere with foreign commerce, and in such case would merit no more favor, on account of the professed purpose of the law, than if avowedly passed to prevent foreign commerce in certain articles, or to prevent it altogether.

The point where regulation ends and prohibition commences

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may in some cases be difficult to determine, as many practical questions are. The cases must be decided as they arise, and, as Mr. Chief Justice Marshall suggests in *Brown v. Maryland*, experience will assist and develop the true tests of decision.

It is sufficient that in the case at bar there is no such difficulty, the design, end, and effect of the law in question being to prohibit the sale of an article made vendible in the States by a law of Congress.

The law is deemed more objectionable because in effect it prohibits the sale of the same article in some towns in the State, and licenses it in others; thus making the law of Congress operate unequally within the territory of the same State.

Finally, the record shows that the only proof against the plaintiff in error was of the sale of brandy imported into Boston, upon which the duties had been duly levied and paid. He was willing to take a license and to pay for it, or to sell his import through any person who was licensed to sell it; but the law forbade all sale in any practicable shape in the town in which he lived, in derogation of the right of sale attached to an article imported under the laws of the United States. In its application to his case the law is void, inasmuch as it derogates from a right secured to him by a law of Congress.

*Mr. R. W. Greene*, for the State.

The law of Rhode Island is strictly a police law, having for its object the suppression of drunkenness. It was not intended to carry out any object of commercial policy. It was not intended to secure to the citizens of Rhode Island, within her own territory or elsewhere, any advantages of commerce or manufactures beyond what are enjoyed by the citizens of all the other States. It was not intended to countervail any commercial policy of the federal government.

It is a law intended to aid in the accomplishment of a great moral reform, and indispensable to its success. The federal government have adopted similar views with the General \*551] Assembly of Rhode Island, is a case coming within the sphere of their constitutional power. An act of Congress authorizes the substitution of tea and coffee for the spirit rations both in the army and navy.

I shall endeavour to show that the Rhode Island law does not present a case of conflict, upon any sound construction of the constitution. What are the provisions of the Rhode Island law? It allows importation, and sale by the importer,

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and every body else, in bulk, as imported. It goes further, it allows a retail trade to the importer and every body else in the article after bulk broken, and that as low as ten gallons. It goes still further, and vests in the towns a discretionary power to decide at their April town meetings, whether they will grant licenses to sell in quantities under ten gallons for the coming year. The inhabitants of the towns are most interested in the decision, and most able to decide right. Not by caprice, but by sober and enlightened judgment. There is a propriety in leaving the decision to the towns.

An objection to the law is, that practically, it is said, the prohibition of sales under ten gallons is a total prohibition. The object in fixing this amount was to prevent sale by the glass.

It is said by the counsel for the plaintiff in error, that this law is prohibitory. But it is not necessarily so, nor probably so. Discretion implies not only the power to decide either way, but the probability of such decisions. If all the towns had been opposed to granting licenses, then the General Assembly would have passed a general prohibitory law.

It is agreed, that, if a conflict results from the practical operation of a law, it must be decided as if such conflict had been intended by the legislature. But the necessary effect must be to conflict, and not the possible, or even the probable effect.

There is no evidence before the court that every town in the State, except Cumberland, has not granted licenses, which are now in full effect. And yet the court is called upon to pronounce this law unconstitutional, upon the ground of this possible prohibition, when the prohibition may not exist in any town in the State, except Cumberland. The power vested in the towns under this law is the same as that vested in the town councils under previous laws. A power to grant licenses is a political power in town councils, and not at all analogous to the cases cited by the counsel for the plaintiff in error. Those were cases of private right, where a mandamus would go to enforce it. Would such a proceeding lie against a town council by a party to whom a license had been refused? But erase from the statute the entire provision vesting any power in the towns to grant licenses, and leave the prohibition upon all sales under ten gallons absolute. This would not be a case of conflict, because it allows of sales at retail as low as ten gallons.

It is admitted that States have a right to pass license laws. All \*had license laws when the constitution was [\*552 adopted; no change took place. What is a license

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law but a prohibition upon every body else, except the party licensed? The difference between a license law and the Rhode Island law is in the degree of prohibition, not the principle. Both are prohibitory; the Rhode Island law may become and probably would become more prohibitory than an ordinary license law. Does this difference render the one law void, when the other is valid? How much more prohibitory must a law be than an ordinary license law, in order to render it void?

What rule or principle can the court adopt in relation to such a subject? How much must be the restriction upon sales, after the article is broken up, and out of the hands of the importer, in order to render the law void? What means has the court to ascertain the practical effect of restrictions? And yet it is said the effect is to determine the law.

All license laws, like the law under consideration, diminish importations and revenue by checking sales. Their object, like the object of the Rhode Island law, is to prevent drunkenness. In other words, to prevent consumption. The check upon importation, and the diminution of the public revenue, is a consequence of both laws, but not their object.

If we were to compare the amount of sales, there being no regulation by license, and the amount of sales under a well-guarded license law, it would be very great, undoubtedly; but no one can ascertain it with any accuracy,—certainly this court cannot. A plain case of conflict must be proved.

This court, in the exercise of its high authority, has always acted upon this subject with caution. It has always required a plain case of unconstitutionality to be made out.

The plaintiff in error says, the question of conflict is a question of fact; but it is not shown that any town, except Cumberland, has refused to grant licenses.

Again; to render a license law valid, how many licenses must it provide for? One in each town, or how many, or one in each county? All license laws materially check importation, by diminishing consumption. What degree of check and restriction will render the law void, on the ground of conflict? Suppose the Rhode Island law prohibited sales as low as five gallons, or one gallon, or a quart; what principle will the court adopt?

License laws were in force in all the States at the time of the adoption of the constitution. No alteration of these laws has been made by the States, and they have never been, and are not now, complained of by the federal government. This shows that, by the understanding of all the parties to that



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instrument, these laws do not interfere with any of the powers of the federal government.

The true rule as to conflict is, not a partial check upon sales, or a partial diminution of the revenue. This involves the inquiry, how much check, how much diminution? Conflict is a prohibition of all sales. It is said the im- [\*558 portation and payment of duties imply the right to sell, that the retail sale is indispensable to give value to the wholesale trade, and therefore a prohibition of the retail sale is void. Payment of duties gives no greater right than importation of a free article, tea or coffee.

But a license law prohibits the retail sale to every body but the party licensed, and this is agreed to be valid. The fact of prohibition, therefore, does not render the law void, but the extent of it. What must that extent be? How can the court ascertain the effect upon sales and importations, except the effect which is a necessary consequence of the law? or, in other words, how can they judge, except of an absolute prohibition of all sales? What means have they to ascertain the difference between the practical effects of one law and another, both being prohibitory, but prohibitory in different degrees?

In *Brown v. State of Maryland*, the true rule is laid down. When an import has been broken up, or has passed from the hands of the importer, it ceases to be an import. It has then passed into the mass of property of the State, and is subject to its authority for purposes of police, internal trade, and taxation.

Unless this be so, Congress may prescribe the police regulation of the States. They may prescribe the extent to which a restrictive regulation may be carried, in order to be constitutional.

We cannot overrate the importance of police powers to the States. The means of social improvement, the success of all institutions of learning and religion, depend on the preservation of this power. We look to the States for the exercise of their authority in aid of all institutions which tend to improve and elevate the moral and intellectual character of the people.

The doctrine of conflict must be expounded with reference to the principle of compromise on which the constitution is founded.

Congress may authorize the importation of an article which is very injurious to the health or morals of a State. The importer may perhaps sell in bulk; then the power of Congress is exhausted, and the power of the State begins. Upon such

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sale the property is mingled with the mass of the other property of the State, and subject to the State power, either to tax, to prohibit, or regulate, as its purpose of police or internal trade may require.

What does the internal trade consist in? In its own products, products of other States, and products of foreign nations. If the doctrine is true with regard to foreign products, it is equally so with regard to products of other States. Then the State power over the property of its own citizens, within its own territory, is limited to products of its own. There will be two kinds of property; one subject to the power of the State, and the other exempt from it.

\*554] \*Unless this be done, it is said the policy of Congress may be countervailed. We answer this by saying that, on the other hand, the police power of the States and the power over internal trade will be destroyed. It is not to be supposed that the States will countervail the policy of Congress merely to countervail it. The compromise of the constitution goes upon a different principle, and at all events the limit of the power of Congress cannot be exceeded in order more effectually to carry out its own policy. If this were a consolidated government, the difficulty would not exist. But it is a confederation of States; external relations are confided to federal government, whilst all domestic relations belong to the States. External policy may be affected by regulations of internal trade or police of the States. This results from the confederacy. Foreign commerce must be affected by internal commerce. Property becomes the subject of internal commerce when it has become incorporated with the mass of the property of the State. Regulations of internal commerce may affect foreign commerce, and foreign commerce may affect internal commerce. Both are valid, nevertheless. Regulations of internal trade may check importation of foreign goods, and the introduction of foreign goods may affect the internal trade and policy of the State. If both governments keep within their constitutional limits, there can be no collision or conflict. The laws of one may affect the operation of the laws of the other. Thus, the police laws of the States in restraining and partially prohibiting the sale of spirituous liquors may affect the operation of the act of Congress under which they are admitted. But this is no conflict. On the other hand, the act of Congress admitting spirituous liquors may countervail the policy of the States. But still there is no conflict. A case of conflict must arise from one government or the other exceeding its limits, and then the law of that government must yield which has ex-

ceeded its authority, whether federal or State. The provision of the constitution as to its supremacy, and the laws passed under it, is confined to laws passed in conformity to its powers.

*Andrew Peirce, Junior, and Thomas W. Peirce, Plaintiffs in error, v. The State of New Hampshire.*

This case originated in the Court of Common Pleas for the county of Strafford, and was carried to the Superior Court of Judicature for the First Judicial District of New Hampshire. The plaintiffs in error were indicted for that they did unlawfully, knowingly, wilfully, and without license therefor from the selectmen of said Dover, the same being the town where the defendants then resided, sell to one Aaron Sias one barrel of gin, at and for the price of \$11.85, contrary to the form of the statute, &c.

\*The counsel for the State introduced evidence to prove the sale of the gin, as set forth in the indictment; and it was proved, and admitted by the defendants, that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin, for the price of \$11.85, and took from said Sias his promissory note, including that sum. It appeared that it was part of the regular business of the defendants to sell ardent spirits in large quantities.

To sustain the prosecution, the counsel for the State relied on the statute of July 4, 1838, which is in these words, viz. :—

“An Act regulating the Sale of Wine and Spirituous Liquors.

“Sect. 1. Be it enacted by the Senate and House of Representatives in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person, so offending, for each and every such offence, on conviction thereof, upon an indictment in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

“Sect. 2. And be it further enacted, that the third section of an act, passed July 7, 1827, entitled, ‘An act regulating licensed houses,’ and other acts or parts of acts inconsistent

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with the provisions of this act, be, and the same hereby are, repealed.

“Approved July 4, 1838.”

The counsel for the defendants moved the court to instruct the jury, that if the law of 1838, under which the respondents were indicted, was constitutional, the sale here was contrary to law, and the note of Sias was void, and that such a payment by note was no payment, and therefore there was no sale. But the court refused so to instruct the jury, but directed them, that, on the supposition the defendants could not recover the contents of the note, they might notwithstanding having violated the statute. The defendants' counsel then introduced evidence that the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store, in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts. And the defendants' counsel contended that the aforesaid statute of July 4, 1838, was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant to the two following clauses in the constitution of the United States, viz.:—

“No State shall, without the consent of the Congress, lay \*556] any \*imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.” “The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

And the defendants' counsel contended that the jury were the judges of the law as well as the fact in the case; that it was their duty to judge of the constitutionality of the act of July 4, 1838, and to form their own opinion upon that question; and that the court were not to instruct the jury relative to questions of law, as in civil cases, but were merely to give advice to the jury in matters of law. The court instructed the jury, that the position that the jury were judges of the law as well as of the fact, as contended for by the defendants' counsel, was not correct, to the extent of the general terms in which it was stated; that the same rule existed in this respect in criminal cases which prevailed in civil cases; that it was the duty of the court to instruct the jury in relation to questions of law, and that the court was responsible for the

correctness of the instructions given; and in case of conviction, if the instructions were wrong, the verdict might be set aside for that cause; but that the jury had the power to overrule the instructions of the court, and decide the law contrary to those instructions, through their power to give a general verdict of acquittal; and that if they did so, and acquitted the defendants, the court could not correct the matter if the jury had erred, because the defendants could not in such case be tried again; and that the circumstance, that the jury had thus the power to overrule the instructions of the court, in case of an acquittal, did not show that they had a right to judge of the law. The court further instructed the jury, that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin. The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States. The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose, but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same \*as other property, and might regulate the sale to some extent; that a State might pass [\*557 health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional. And the court further said, in conclusion (the sale being admitted, and the instructions of the court that the law, as applicable to this case, was constitutional, having been given), that nothing farther remained in this particular case, unless the jury saw fit to exercise the power that they possessed of overruling the instructions of the court, and giving a verdict contrary to those instructions; and that if they did so, and acquitted the defendants, the court could

not set aside the verdict, even if an error had been committed.

The jury having returned a verdict, that the defendants were guilty, the defendants excepted to the foregoing instructions, and to what is said in conclusion of the charge as aforesaid, and filed this bill; which was sealed and allowed.

JOEL PARKER.

This judgment having been affirmed by the Superior Court of Judicature, a writ of error brought the case up to this court.

It was argued at a prior term, by *Mr. Hale*, for the plaintiffs in error, and *Mr. Burke*, for the State, and held until now under a *curia advisare vult*.

*Mr. Hale*, for the plaintiffs in error.

As the questions relating to the several interrogatories which were propounded to the jurors, and those which the court below refused to have put to them, and the question whether, in criminal cases, the jury are judges of the law as well as the fact, and every other question raised in the bill of exceptions to the ruling of the judge who tried the case, save the single one of the constitutionality of the law of New Hampshire, entitled "An act regulating the sale of wine and spirituous liquors," passed July 4, 1838, belonged appropriately to the superior court of that State finally to adjudicate upon, and are not supposed in this case to appertain to the jurisdiction of this court, I shall pass them over entirely, and proceed at once to the consideration of the only question which this case presents to this tribunal for decision. That question is,—“Is the act of the legislature of New Hampshire, above mentioned, in accordance with, or in contravention of, the constitution of the United States?”

The plaintiffs in error contend that it is repugnant to that clause of the constitution of the United States which provides that “no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws”; also, because it is repugnant to that clause which \*558] declares that “the Congress shall have \*power to regulate commerce with foreign nations, and among the several States and with the Indian tribes.”

Believing that the whole ground covered by this case has been more than once considered by this court, fully and ably argued by eminent and distinguished counsel on both sides

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of the question, and so palpably and distinctly decided in divers cases, especially in *Brown v. Maryland*, 12 Wheat., 419, that it is not in the power of sophistry even to withdraw this law from that sphere of legislation which the decision in that case prohibited to the States, I trust I shall be considered as having fully discharged my duty to my clients, when I have briefly adverted to a very few of the many palpable reasons assigned by the court for the ground they then assumed, and which, it is confidently believed, will avail to the plaintiffs in error in the present case.

If this barrel of gin had been imported from a foreign country, could the State of New Hampshire have prohibited its introduction into their territory? The answer to this interrogatory is obvious and palpable. It will not for a moment be contended, that, while the constitution prohibits any State from laying any imposts or duties on imports or exports, the right is left to the several States to prohibit importations altogether. The power of regulating imports from foreign countries falls so directly and inevitably under the power to regulate commerce, that it has never been denied to belong to Congress. I shall proceed upon the assumption, that no one can controvert this plain proposition. If the State could not prohibit its importation from a foreign country, could the State prohibit its sale? Clearly not. Justice Story, in his Commentaries (vol. 2, § 1018), says:—"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

Chief Justice Marshall (*Brown v. Maryland*, 12 Wheat., 446), says:—"If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to

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\*559] regulate commerce. Congress \*has a right, not only to authorize importation, but to authorize the importer to sell."

Upon these authorities, I take it to be clear, that, if this barrel of gin had been imported from a foreign country, the State of New Hampshire neither could have prohibited its introduction into their territory, nor its sale while it remained in the situation in which it was imported.

The next question is, whether, it being an importation from a sister State instead of a foreign country, it is not equally protected by the constitution and laws of the Union; or, in other words, is commerce with foreign nations put on a better foundation by the constitution than commerce between the several States? There surely is nothing in the words of the constitution, nothing in the manner in which the constitution is expressed, to warrant such a position. The provisions applicable to both species of commerce are found in the same sentence, the one immediately following the other. But we are not left to conjecture on this subject. Chief Justice Marshall, in delivering the opinion of the court, in the case (*Brown v. Maryland*) before cited, says:—"It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State." Justice Story, in his Commentaries (vol. 2, § 1062), says:—"The importance of the power of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with sovereign States. The history of other nations furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide, that each canton shall be obliged to allow a passage to merchandise through its jurisdiction, without an augmentation of tolls. In Germany, it is a law of the empire, that the princes shall not lay tolls on customs or bridges, rivers or passages, without the consent of the emperor and Diet. But these regulations are but imperfectly obeyed, and great public mischiefs have followed. Indeed, without this power to regulate commerce among the States, the power of regulating foreign commerce would be incomplete and ineffectual. The very laws of the Union in regard to the latter, whether for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits, might be evaded at pleasure, or rendered impotent. In short, in a practical view, it is impossible to separate the regulation of foreign commerce and domestic commerce among the States from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over



the one, which does not conduce to establish the propriety of conceding the power over the other."

If these authorities can establish a position, then is an importation like the one in the case under consideration entitled to the same privileges and immunities, including, of course, the right to \*sell, that would have belonged to it if it had been an importation from a [\*560 foreign country.

This law of New Hampshire has sometimes been supposed to be saved from the operation of the constitutional principles, as laid down by the court in the case of *Brown v. Maryland*, by the decision in *New York v. Miln*, 11 Pet., 102. An attentive examination of that case, so far as any analogy is found to exist between that and the present, will furnish no foundation upon which to base any such conclusion. Instead of overruling the doctrines sanctioned by the court, in the cases of *Gibbons v. Ogden*, 9 Wheat., 1, and *Brown v. Maryland*, the court say, that the question involved in the case of *New York v. Miln* is not the very point decided in either of the cases above referred to; but, on the contrary, the prominent facts of that case were in striking contrast with those which characterized the case of *Gibbons v. Ogden*; nor, say the court, is there the least likeness between the facts of this case and those of *Brown v. Maryland*. And the reasons upon which the decision in the last-named case rests are repeated and reaffirmed in the case of *New York v. Miln*. The court, in stating the difference between the two cases, say:—"Now it is difficult to perceive what analogy there can be between a case where the right of the State was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not. The court did, indeed, extend the power to regulate commerce, so as to protect the goods imported from a State tax after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce, and because, as the power to regulate commerce, under which the importation was made, implied a right to sell, that right was complete, without paying the State for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods." Keeping this palpable

and most obvious distinction in view, and ascertaining what were the points raised and settled in the case of *New York v. Miln*, there is no danger of the mind being misled by any of the remarks of the court in delivering their opinion in that case. The State of New York passed a law, requiring the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States other than New York, under certain penalties, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage. It was contended by the \*defendant in that case, that "the act of \*561] the legislature of New York aforesaid assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The court decided that it was not a regulation of commerce; that persons were not a subject of commerce, and that it did not come within the principles settled in *Gibbons v. Ogden*, or *Brown v. Maryland*.

Nor can a distinction be found between this case and that of *Brown v. Maryland*, from the fact, that in Maryland the importer was compelled to pay fifty dollars for his license, and in New Hampshire it does not appear that he is compelled to pay any thing. Chief Justice Marshall, in stating that case, says:—"The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported."

To that inquiry the court by its decision gave a negative answer; and when they add, as the constitution most palpably authorized them to, that "the principles laid down in this case apply equally to importations from a sister State," it seems that they decided every principle involved in the case at bar, unless there be something peculiar in the subject-matter upon which the legislature of New Hampshire has legislated, viz. wine and spirituous liquor; upon which I propose to submit a few suggestions presently. The question was not as to the amount to be paid for the license, nor whether any thing was to be paid, but as to the right of the State to require it under any circumstances.

Now let us see what this act of the legislature of New Hampshire undertakes to do. It assumes that the State may prohibit, under severe penalties to every one within her limits, the entire commerce in wines and ardent spirits. No matter that we have treaties with foreign powers authorizing their

importation and sale into the country; no matter that Congress have admitted them into the country under the general laws of the whole Union, and, to encourage the manufacture, have made such as are produced from certain specified substances entitled to debenture upon exportation; no matter that the government of this Union at this moment derives no inconsiderable portion of its revenue from the duties levied upon these proscribed articles of commerce; this act of New Hampshire subjects every individual who sells a barrel, hogshead, cargo, or any quantity, great or small, without a license from the selectmen of some one of her towns, to the ignominy and expense of a criminal prosecution, conviction, and fine or imprisonment.

Is there any thing in the nature of the object concerning which New Hampshire has legislated to constitute it an exception from these general provisions? It is worthy of notice, that a large proportion of the articles for the sale of which the laws of Maryland \*required a license, and [\*562 which laws this court pronounced unconstitutional, consisted of various kinds of distilled spirituous liquors; and it did not occur to the distinguished counsellors engaged in that case, that there was any thing in that circumstance to call for the application of a rule of construction different from what was applied to other subjects of commerce.

The court below, in the case at bar, admit that the State of New Hampshire cannot regulate commerce between that and the other States; that they cannot prohibit the introduction of articles from another State, with such a view, nor prohibit the sale of them for such a purpose; but that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The doctrine of the right of a State to pass health and police laws, carried to the extent here claimed, would be a virtual abrogation of the constitution, and a total nullification of that power in the general government to regulate commerce, which was one of the chief objects proposed to be attained by the establishment of the federal constitution. Let us test this principle by some subject other than wine and ardent spirits. Many philanthropists and physicians contend that the use of tobacco is as injurious as that of intoxicating drink. Will it for a moment be supposed that therefore a State, or any number of States, may prohibit the introduction of tobacco within their borders, and make the selling of it an indictable offence? May one or more of the

wool-growing States of this Union, under the right to make health and police regulations, prohibit the introduction of cotton into their limits, and make him who would sell it a felon, and then escape the condemnation so justly due to such an unwarrantable assumption of power, on the ground that it was more healthful for their citizens to be clad in woollen than in cotton garments? Not a few reformers of the present day believe and affirm that the use of tea and coffee is, in all cases, injurious; and if such a sect should momentarily acquire the ascendancy in any of the State legislatures, may they render commerce in those articles criminal?

Another sect of reformers, by no means despicable in point of numbers or talents, honestly believe, and strenuously assert, that the use of animal food is an evil which ought not to be tolerated; but may a State, a majority of whose citizens entertain such an opinion, punish with fine and imprisonment the act of selling beef and pork, imported from a sister State?

May a State engaged in the whale fishery prohibit the introduction of tallow candles, and make the sale of them criminal on any such pretence, or a State interested in the manufacture of the latter article prohibit the introduction of oil, or sperm candles?

It may be urged that no such abuse of this power is to be \*563] apprehended. But an answer to such a suggestion is found given by that eminent and learned judge who delivered the opinion of court in the case of *Brown v. Maryland*, where he says,—“All power may be abused. It might with equal justice be said, that no State would be so blind to its own interest as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise.” And Justice Story, in his Commentaries (vol. 2, § 1066), lays down this express limitation to the power of a State to pass inspection laws, health laws, &c.,—“that they do not conflict with the powers delegated to Congress.” And Chief Justice Marshall says expressly, “that it cannot interfere with any regulation of commerce.”

Let it not be forgotten that the oppressed and degraded condition of commerce was one of the most urgent and pressing reasons which induced the formation of the constitution. “Before that time each State regulated it with a single view to its own interest; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to

enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce between the States.”—2 Story’s Commentaries, § 1054. This power, if it be permitted to the States, will be abused. There is no safety for the whole people in placing it anywhere save in those hands where the constitution has placed it. If, on any pretence, however specious, for the purpose of advancing any cause, however popular or praiseworthy, this function of the general government, so vital to its character, may be usurped by a State legislature, the barrier between the two powers is broken down, and the purposes of the Union itself defeated. Fanaticism never proposed a measure so wild and absurd, that specious and plausible arguments have not been devised to sustain the measures by which it would effect its object.

This case finds that the plaintiffs in error purchased this barrel of gin in Massachusetts. No law of any State, or of the Union, was violated by that act. They were, thus far, in the pursuit and prosecution of a lawful commerce. They brought it coastwise to the landing at Piscataqua Bridge (in New Hampshire), and from thence to their store in Dover. No law is yet broken. And then, in the same barrel, and in the same condition in which it was \*purchased in Massachusetts, and in which they imported it from a [\*564 sister State, they sold it to Sias. If, as this court has already decided, the same principles apply to commerce between the States that apply to commerce with foreign nations, may it not, without arrogance or presumption, be asked, if human ingenuity can honestly distinguish this case from the one already decided by this court, and so often referred to?

Perhaps I owe an apology to this honorable court for urging upon them arguments so familiar and principles so well settled; but believing, as my clients do, that, instead of receiving, as they were entitled to, the protection of the government in their lawful business, they have been branded as criminals, their property taken, and their constitutional rights trampled upon, they have, in the last resort, appealed to this tribunal for that redress and protection against unconstitutional State legislation, to afford which so eminently belongs to this honorable court.

They rely with confidence upon the assurance that here, at least, law may be administered, right defended, and justice maintained, uncontaminated by the breath of a local and temporary diseased sentiment, which, in its misguided and abortive attempts at reform, essays to eradicate physical and moral evil from society, and corruption from the human heart, by the wondrous efficiency of legislative enactment. They rely with confidence upon that protection to commerce which this court, on divers occasions, have extended, though, in so doing, they have been under the necessity of pronouncing the legislation of more than one State invalid and unconstitutional. It was to protect commerce that this Union was established. Take away that power from the general government, and the Union cannot long survive.

Having thus referred the court to the positions which I suppose sustain my clients,—positions occupied and illustrated by the profound learning, deep research, and luminous reasoning of Marshall and Story, in their expositions of this branch of the constitution,—I leave this case, in the confidence that my clients, in common with all the other citizens of this whole country, will ever find (as they ever have in times past) in this court a full and ample protection for their constitutional rights, against which the waves of fanaticism, as well as of faction, may beat harmlessly.

*Mr. Burke*, for the State.

(The argument upon the two first points, respecting the rights of the jury, is omitted.)

III. The third and last point raised in this case is the following, viz. :—

That the court by whom this cause was tried instructed the jury that the act of the legislature of the State of New Hampshire, approved July 4, 1838, under which the plaintiffs \*565] in error were \*indicted, was not repugnant to the constitution of the United States, nor to any treaty between the United States and foreign nations.

The provisions of the constitution of the United States, to which the law of the State of New Hampshire is alleged to be repugnant, are in the following words :—

1. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. 1, § 10, part of 2d clause.

2. "The Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." Art. 1, § 8, clause 3.

The act before mentioned is also alleged to be repugnant "to certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States."

By the admission of the plaintiffs in error on the trial, it appears that the "gin" alleged in the indictment to have been sold by them was "American gin."

Therefore, taxing the gin, or prohibiting its sale, except upon the terms of the act of the State of New Hampshire, before referred to, did not conflict with the clause of the constitution of the United States first cited above; because it was not an "import," nor an "export," in the sense of that provision of the constitution.

And for the same reason, taxing, or restricting its sale, did not conflict with the first member of the second clause of the constitution, above cited, which clothes Congress with the power "to regulate commerce with foreign nations"; nor with the last member of the clause, which empowers Congress to regulate commerce "with the Indian tribes"; nor with the public treaties of the United States with foreign nations.

If it conflict with any provision of the constitution, it is with the second member of the second clause above cited, which gives Congress the power to regulate commerce "among the several States"; and that, it is apprehended, is the only question of which this tribunal has cognizance in this case. But, before proceeding to the argument of this question, the supposed ground on which the plaintiffs in error rely will be briefly examined.

It is anticipated that the plaintiffs in error will rely mainly on the case of *Brown v. The State of Maryland*, reported in 12 Wheat., 419; 7 Cond. Rep., 554. It therefore becomes necessary to compare the facts of that case with the present, and to examine the principles laid down by Chief Justice Marshall in giving the opinion of the court.

That case was an indictment for selling "one package of foreign dry goods," contrary to an act of the legislature of the State of Maryland, requiring all "importers" of "foreign goods and commodities," selling the same by wholesale, in bulk, to take out a \*license, under a penalty of one [\*566 hundred dollars, and the forfeiture of the amount of the license tax, which was fifty dollars, for a neglect to comply with the provisions of the act. The act of the legislature of Maryland was a revenue law, and a tax imposed upon the importer under the form of a license tax, a revenue tax, and not a police regulation to restrain the sale of an article which

was deemed injurious to the health and morals of the people of that State. The persons taxed were the importers of foreign goods, and not the dealers in articles of domestic manufacture or production. The case, therefore, of *Brown v. The State of Maryland* is different in all its features from the case at bar. It differs from it in two most prominent features:—

1. The act of the legislature of New Hampshire, under which the plaintiffs in error were indicted, was a police regulation, and not a revenue law.

2. The commodity sold was not an article of foreign production, nor an “import,” but was an article of American manufacture.

These two circumstances distinguish the case at bar widely from the case relied on by the plaintiffs in error. The reasoning, therefore, of the court in *Brown v. Maryland* will not apply to this case.

But it is apprehended, that, if the “gin” sold by the plaintiffs in error had been imported, themselves not being the importers, they could not sustain their side of the case on the principles laid down by the court in *Brown v. Maryland*. Chief Justice Marshall says, the article is exempt from the taxing power of a State “while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported.” “This state of things,” he adds, “is changed if he [the importer] sells them, or otherwise mixes them up with the property of the State, by breaking up the packages and travelling with them as an itinerant peddler.” In which case “the tax finds the article already incorporated with the mass of property by the act of the importer.” He “has himself mixed them up in the common mass; and the law may take them as it finds them.”

From these principles two deductions follow:—

1. That the article is exempt from the taxing power of the State while it is in the possession of the importer in bulk, and has not become incorporated with the general mass of property in the State.

2. When it has thus become incorporated with the mass of property in a State, it is subject to all the laws, restrictions, regulations, and burdens to which other descriptions of the mass of property are subject.

In the case at bar, on the supposition that the gin was originally imported, the sale of it by the importer to the plaintiffs in error, and its subsequent transportation into New Hampshire, was such an incorporation of it with the mass of property in the State of New Hampshire as to subject it to



the taxing power and police \*regulations of the State, in the same manner and to the same extent to which [\*567 all property within its jurisdiction was subject.

Again, it is admitted by the court in *Brown v. Maryland*, that the "police power" remains with the States. The act of the legislature of New Hampshire, under which the plaintiffs in error were indicted, is a portion of the police system of that State, and, according to Chief Justice Marshall, is not repugnant to the constitution of the United States.

But the plaintiffs in error may rely upon the *obiter dictum* of the court in *Brown v. Maryland*, that "we [the court] suppose the principles laid down in this case to apply equally to importations from a sister State." It cannot be supposed, however, that a remark thus casually and loosely expressed can be regarded as authority in the case at bar. If the gin had been foreign gin, and had been purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire, would it have been such an "importation from a sister State" as to exempt it from the taxing power or police regulations of the State of New Hampshire? And can the fact of its being "American gin," and of having been purchased in Massachusetts (whether manufactured there or not does not appear), give it greater privileges and exemptions in the State of New Hampshire, than if it had been manufactured in New Hampshire, carried to Massachusetts, and there purchased by the plaintiffs in error, and brought back by them to New Hampshire, and sold in the same vessel in which it was originally put up by the manufacturer? But this point will be more fully considered hereafter.

It may also be said, that the "gin" was purchased in Boston in the same barrel in which it was afterwards transported from Massachusetts to New Hampshire, and there sold. In other words, it was sold by the plaintiffs in error "in bulk," and therefore comes within the principles of the case of *Brown v. Maryland*, and could not be taxed by the laws of New Hampshire, nor its sale in any way regulated or restricted.

This position is not believed to be tenable. If it were, it would be impossible to prevent the evasion of the license laws of the State of New Hampshire. Ardent spirits could not be purchased in Massachusetts in vessels containing a less quantity than one barrel,—in vessels containing no more than a gallon, a quart, or a pint, and in that form carried into the State of New Hampshire, and sold in spite of the laws regulating the sale of spirituous liquors. It is believed that no such quibbling with, or evasion of, the laws of a State, can shelter itself under the provision of the constitution which

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grants to Congress the power "to regulate commerce among the several States."

But the case of *Brown v. Maryland* does not turn on the principle contended for. The taxing power of Maryland in that case seized hold of the commodity while it retained the character of an "import," and before it became incorporated \*568] with the general mass \*of property in the State. In that state of the commodity, the court held that the taxing power of Maryland could not reach it. And one of the reasons assigned for the decision was, that the importer, by paying the duty upon the article to the United States, had purchased the right of selling it, of which he could not be deprived by the legislation of a State. In the case at bar, the plaintiffs in error had purchased no right to sell their gin by the payment of duties upon it; and, furthermore, it had become incorporated with the general mass of property in the State of New Hampshire.

But the true and only question involved in the case, and which is presented for the decision of this tribunal, is now approached.

Is the act of the legislature of New Hampshire regulating the sale of spirituous liquors, approved July 4, 1838, repugnant to that provision of the constitution of the United States which clothes Congress with the power "to regulate commerce among the several States"?

If it should be regarded as a law whose object was revenue alone, it is believed then not to be repugnant to the provision of the constitution just cited. But, before proceeding further, it becomes necessary to inquire into the meaning of this provision of the constitution, and the extent of the power which it delegates to Congress. And, in order to comprehend it clearly, it will be necessary to recur to the circumstances in the history of the country, prior to the adoption of the present constitution, which led to the investment of this power in Congress. Previous to that time, it is well known that the States comprising the Union had separate and independent systems of revenue, commerce, and navigation. One of their sources of revenue was the levying of duties on foreign imports. They had the same power over the products of other States, when imported into their jurisdictions. Each State legislated for itself, in relation to duties, tonnage, and navigation. Of course the exercise of this right to regulate commerce, which each State then possessed, led to numerous conflicts with the legislation and the interests of other States, which did not fail to engender deep and malignant animosities, as the history of the times abundantly proves. Trade

was restricted between the States, and the interchange of commodities, so essential to the interests and advancement of all, was greatly embarrassed. Hence was there an imperative necessity to wrest this dangerous power from the individual States, and vest it in the general government, in order to secure a uniformity of its exercise. In *Gibbons v. Ogden*, 9 Wheat., 1, this power is assumed by the court to be exclusively vested in Congress. The extent, therefore, of the power embraces the whole of it, subject, however, to the inspection laws, health laws, police regulations, &c., &c., which the court, in the case last cited, admit belong to the great mass of general legislation reserved to the States.

But this power extends only to the transportation and \*introduction of articles of commerce from one State [569 into the limits of another. When a commodity is introduced within the jurisdiction of another State, it becomes subject to the laws of that State. In other words, each State has the power to regulate the internal traffic within its limits. This position is sustained in *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. The State of Maryland*, 12 Id., 419; *City of New York v. Miln*, 11 Pet., 102.

The power to regulate commerce among the States is supervisory. It was designed by the framers of the constitution to secure to the several States of the Union a free interchange of their products, and their transit through the territories of each, unencumbered with any burdens, duties, or taxes, except such as grow out of the inspection, health, and police regulations of the respective States. In other words, it was designed to secure free trade among the States. And in accordance with this view of the power of Congress to regulate commerce between the States is that provision in the constitution which prohibits to the States the power "to lay any duty on tonnage"; and also that provision of the constitution which prohibits any "regulation of commerce or revenue, which shall give preference to the 'ports of one State over those of another.'" Thus it is the manifest intention of the constitution that the power of Congress over commerce between the States shall be supervisory merely, and exerted only to secure perfect freedom of trade and intercourse between the States. (See the *Federalist*, No. 42, p. 182, Wash. edition, 1831.) With this view, Congress has passed navigation laws, which secure to the vessels of one State the same privileges in the ports of another State which the vessels of the latter enjoy in its own ports.

But does the act of the legislature of New Hampshire interfere with this power of Congress "to regulate commerce

among the States," as above defined? Does it prevent the unrestricted introduction of articles from other States into the State of New Hampshire, or their free transit through its territories? It may be safely affirmed that it does not.

It is stated in the bill of exceptions, that the gin sold by the plaintiffs in error was brought from Boston, the place of its purchase, "coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store in Dover." But can the mode by which the article was transported from Massachusetts, and introduced into the territory of New Hampshire, secure to it any constitutional protection? It will not be pretended. The gin would have been entitled to the same privileges and immunities if it had been transported by railroad, or by one of the numerous baggage-wagons which run to and from Massachusetts and New Hampshire. It cannot be a privileged article, because it was carried "coastwise" into the State of New Hampshire. But it may be confidently affirmed that Congress, under the general \*570] power "to \*regulate commerce among the several States," cannot secure to the productions and manufactures of one State, imported into another State for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter would enjoy within its own jurisdiction. Congress cannot give to the productions and manufactures of Massachusetts, which are carried into New Hampshire for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter State would possess within the limits of its own territories. The "barrel of gin" purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire for sale and consumption, could not claim greater privileges and exemptions than a "barrel of gin" manufactured in the State of New Hampshire. The former must be subject to the same laws and regulations to which the latter would be subject. And it will hardly be pretended that the legislature of New Hampshire could not pass laws regulating the sale, within its own limits, of spirituous liquors, or of any other article manufactured within its own jurisdiction. And if Congress should attempt to interfere in such a case, it would be a most gross and palpable invasion of the reserved rights and the internal police of New Hampshire.

But it may be contended that the license law of the State of New Hampshire conflicts with the provision of the constitution which gives Congress power to regulate commerce among the States, because it is general and sweeping in its

provisions, and prohibits the sale of wines and spirituous liquors in any quantity. Such a position, if assumed, cannot be maintained by any sound argument. It would make the constitutional question involved in this case depend upon the quantity of liquor sold, and not the thing itself. And where should be the limit of the law as to the quantity the sale of which it would be constitutional to prohibit? Would it be confined to a pint, a quart, or a gallon? And could the grave constitutional question raised in this case depend upon an absurdity so palpable, not to say ridiculous?

But the subjection of the productions of one State, when introduced for the purpose of sale and consumption within the territories of another, to the internal laws and regulations of the latter State, finds an analogy in the case of the citizens of one State going into the jurisdiction of another.

The constitution provides, that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." Citizens of one State, going into the jurisdiction of another State, can claim no exemption from its laws under this clause. If they enter the territory of another State merely to pass through it, the power of the law surrounds them to protect them from violence and to restrain them from crime. If they violate the laws of the State into whose territory they pass, they are subject, \*like all the citizens of that State, to all the penalties which the laws impose. If they remain in the State, [\*571 they become subject to the taxing power, and all the burdens and restraints which its laws impose upon its own citizens. Can an article of commerce, produced in one State and carried into another for sale and consumption, claim greater privileges and exemptions in the latter State than citizens of the same State passing into another can claim? Such a position will hardly be ventured upon.

But, finally, it is contended for the State of New Hampshire, that the act of July 4, 1838, under which the plaintiffs in error were indicted, is a police regulation, which it was within the competency of the legislature of that State to enact, and is therefore not repugnant to the constitution of the United States.

In the case of *Gibbons v. Ogden*, 9 Wheat., 203, the court say, that "inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike-roads, ferries, &c., are component parts of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government."

The law of the legislature of New Hampshire under consideration is a police regulation. Its design and object are to preserve the public morals and health of the State, and it is clearly within the recognized constitutional authority of the legislature of that State to enact. This power, it is admitted by the court, in the cases of *Brown v. Maryland*, *Gibbons v. Ogden*, and *The City of New York v. Miln*, all before cited, the States may exercise, even if it interfere with foreign commerce. The States may pass laws regulating the sale of gunpowder, which is clearly a police regulation, and necessary for the safety of the people, particularly in large cities. They may, also, by their health laws, intercept and prohibit the sale of an infected article, notwithstanding the duty may have been paid on it, and it may yet remain in the hands of the importer, in bulk, in the character of an import; *a fortiori* may they intercept and prohibit the sale of an infected article, produced in another State, and transported within the jurisdiction of the former for sale. For the same reason may the States, by their police regulations, prohibit the sale of obscene books, imported from a foreign country, notwithstanding the duty may have been paid on them, and they may remain in the original package. So, also, may they prohibit the sale of an obscene book written in this country, on which the copyright has been secured from the government of the United States, notwithstanding the fee required in such cases has been paid. Such cases, it is believed, would be analogous in principle to the power to regulate or prohibit the sale of spirituous liquors. On this point the following cases are relied on: *Lunt's case*, 6 Greenl. \*572] (Me.), 412; *Beal, plaintiff in error, v. The State of Indiana*, 4 Blackf. (Ind.), 107; *King v. Cooper, plaintiff in error*, 2 Scam. (Ill.), 305.

And in confirmation of the authorities cited on this point, it may be observed that the license system was adopted in England at a very early period of her history, and has ever since composed a part of the police system of that kingdom. See Crabbe's History of English Law (London edit.), p. 477; see also the different enactments of the British Parliament, in 7 Evans's Stat., pp. 1-32, title *Ale-houses*. Many of the English statutes relate to the sale of imported as well as domestic liquors. They, of course, conflict with the import as well as excise systems of that government; and yet, it is believed, they never have been called in question.

License regulations were also adopted by the provincial legislature of New Hampshire at an early period. See Provincial Laws of New Hampshire (edit. of 1761), pp. 64, 148.

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Similar legislation, it is believed, has been adopted in nearly every State in the Union.

But if the law of the legislature of New Hampshire, now under consideration, shall not be regarded as a police regulation, it is clearly a law regulating the internal commerce of the State, and therefore constitutional, according to the doctrine laid down in *Gibbons v. Ogden*, before cited. It may also claim analogy with the laws relating to hawkers and peddlers, which, it is believed, have been enacted in some form in every State in the Union.

And, in conclusion, the remark will be ventured upon (although, perhaps, not appropriate in a mere argument), that the people of the State of New Hampshire, almost without distinction of age, sex, or condition, feel a deep and absorbing interest in the final issue of this question. Their sentiments concur with the sense of nearly the whole civilized world, which now concedes that the traffic in intoxicating liquors is a crime against society. It is disapproved by man, and stands condemned by the great moral Judge of the universe, whose purity cannot countenance such manifest and admitted wrong. It is the foul parent of immorality and crime, and the prolific source of unspeakable misery and sorrow to innumerable individuals and families. And is it to be contended that it is repugnant to the constitution of the United States to restrain and prohibit such inhuman traffic?—to extirpate a moral crime, which grows blacker and more hideous the longer it is contemplated, and the more its horrible effects become visible? And deeply anxious are the people of New Hampshire that this vicious trade shall receive no countenance from the judgment of the august and enlightened tribunal to whose arbitrament this cause is now most respectfully submitted.

\*Mr. Chief Justice TANEY.

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In the cases of *Thurlow v. The State of Massachusetts*, of *Fletcher v. Rhode Island*, and of *Peirce et al. v. The State of New Hampshire*, the judgments of the respective State courts are severally affirmed.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is

more convenient to consider them together. Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

The cases have been separately and fully and ably argued, and the questions which they involve are undoubtedly of the highest importance. But the construction of this clause in the constitution has been so fully discussed at the bar, and in the opinions delivered by the court in former cases, that scarcely any thing can be suggested at this day calculated to throw much additional light upon the subject, or any argument offered which has not heretofore been considered, and commented on, and which may not be found in the reports of the decisions of this court.

It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the constitution for which they are respectively contending. And I am the less inclined to do so because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court.

The constitution of the United States declares that that constitution, and the laws of the United States which shall \*574] be made in \*pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States.



It is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every important article, where the paramount power of Congress terminates, and that of the State begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the constitution.

This question came directly before the court for the first time in the case of *Brown v. The State of Maryland*, 12 Wheat., 419. And the court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the \*importer, and also when the commodity had passed from his hands [\*575

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into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of *Brown v. The State of Maryland*, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

I argued the case in behalf of the State, and endeavoured to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.<sup>1</sup> The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, vil-

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<sup>1</sup> See *Low v. Austin*, 13 Wall., 33.

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lages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in *Brown v. The State of Maryland*, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the State laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the

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importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that \*577] disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citi-

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zens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the States. And as these laws of Massachusetts and Rhode Island are not repugnant to the constitution of the United States, and do not come in conflict with any law of Congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I come now to the New Hampshire case, in which a different principle is involved,—the question, however, arising under the same clause in the constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits, \*in any quantity, without a license from the selectmen of the town in which the party resides. [\*578 The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. And, according to the doctrine in *Brown v. Maryland*, the article in question, at the time of the sale, was subject to the legislation of Congress.

The present case, however, differs from *Brown v. The State of Maryland* in this,—that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the

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limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.

The question, therefore, brought up for decision is, whether a State is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in *Brown v. The State of Maryland*. I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my \*579] brethren with whom I \*do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently I think was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

The language in which the grant of power to the general government is made certainly furnishes no warrant for a dif-

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ferent construction, and there is no prohibition to the States. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the constitution to the general government. On the contrary, in many instances, after the grant is made, the constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, the framers of the constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with State laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate. For if the mere grant of power to the general government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all State laws upon the subject would be *ipso facto* void, and there could therefore be no such thing as conflicting laws, nor any question \*about the supremacy of conflicting legislation. It is only where both may legislate on the subject, that the question can arise. [\*580

I have said that the legislation of Congress and the States has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of Congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime States, as fully and entirely since the adoption of the constitution as they were before; and there is but one law of Congress making any specific regulation upon the

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subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true, that the act of 1789 provides that pilots shall continue to be regulated by the laws of the respective States then in force, or which may thereafter be passed, until Congress shall make provision on the subject. And undoubtedly Congress had the power, by assenting to the State laws then in force, to make them its own, and thus make the previous regulations of the States the regulations of the general government. But it is equally clear, that, as to all future laws by the States, if the constitution deprived them of the power of making any regulations on the subject, an act of Congress could not restore it. For it will hardly be contended that an act of Congress can alter the constitution, and confer upon a State a power which the constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress could no more restore to the States the power of which it was thus deprived, than it could authorize them to coin money, or make paper-money a tender in the payment of debts, or to do any other act forbidden to them by the constitution. Every pilot law in the commercial States has, it is believed, been either modified or passed since the act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the States now contended for should be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various State laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the constitution which I am now maintaining. \*So, also, in regard to health and quarantine

\*581] laws. They have been continually passed by the States ever since the adoption of the constitution, and the power to pass them recognized by acts of Congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbours of the State. They sub-



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ject the ship, and cargo, and crew to the inspection of a health-officer appointed by the State; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the State authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the State law, and not by Congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by Congress ever since the adoption of the constitution, and constantly affirmed and supported by this court whenever the subject came before it.

The decisions of this court will also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and,—

First, to *Gibbons v. Ogden*, because this is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of *Gibbons v. Ogden*, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject-matter before the court, establishes the doctrine that a State may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of Congress. Upon examining that opinion, it will be seen that the court, when it uses the expressions \*which are supposed to countenance the doctrine of [\*582 exclusive power in Congress, is commenting upon the

argument of counsel in favor of equal powers on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for State purposes, although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the State power is concurrent with that of the general government,—is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon Congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the court uses the expressions which are supposed to maintain an absolute prohibition to the States. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of Congress, and explicitly puts its decision upon that ground. Now the whole of this part of the opinion would have been unnecessary and out of place, if the State law was of itself a violation of the constitution of the United States, and therefore utterly null and void, whether it did or did not come in conflict with the law of Congress.

Moreover, the court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

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It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard \*the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are [\*583 yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.<sup>1</sup> It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State, or whatever the real object of the law; and it requires no law of Congress to control or annul them. Yet the case of *Gibbons v. Ogden* unquestionably affirms that such regulations may be made by a State, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon Congress the superior and controlling power. And to expound the particular passages herein before mentioned in the manner insisted upon by those who contend for the prohibition would be to make different parts of that opinion inconsistent with each other,—an error which I am quite sure no one will ever

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<sup>1</sup> See *Munn v. Illinois*, 4 Otto, 125.

impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of *Gibbons v. Ogden* was such as I have insisted on is, I think, conclusively proved by the case of *Willson et al. v. The Blackbird Creek Marsh Company*, 2 Pet., 251, 252. In that case a dam authorized by a State law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the State law was objected to, on the ground that it was repugnant to the constitution of the United States, being a regulation of commerce. But the court says,—“The \*584] repugnancy of the law of Delaware to the \*constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question,” and then proceeds to decide that the law of Delaware could not “be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”

The passages I have quoted show that the validity of the State law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon *Gibbons v. Ogden* as conclusive authority to show the unconstitutionality of the State law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment show most clearly what was intended in *Gibbons v. Ogden*; and that in that case, as well as in the case of *Willson v. The Blackbird Creek Marsh Company*, the court held that a State law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall; and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of the *City of New York v. Miln*, 11 Pet., 130, the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on

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the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court.

For my own part, I have always regarded the cases of *Gibbons v. Ogden*, and *Willson v. The Blackbird Creek Marsh Company*, as abundantly sufficient to sanction the construction of the constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus, in the case of *Houston v. Moore*, 5 Wheat., 1, it was held, that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from \*legislating [585 on the same subject, provided the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of Congress.

The same doctrine was held in the case of *Sturges v. Crowninshield*, 4 Wheat., 196, under the clause in the constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of *Chirac v. Chirac*, 2 Wheat., 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the constitution, but insisted that the Maryland law was "virtually repealed by the constitution of the United States, and the act of naturalization enacted by Congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility be a State law which did not come in conflict with it. And, indeed, in this case it might well have been doubted whether the grant in the constitution itself did not abrogate the power of the States, inasmuch as the constitution also provided, that the citizens of each State should be entitled to

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all the privileges and immunities of citizens in the several States; and it would seem to be hardly consistent with this provision to allow any one State, after the adoption of the constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the constitution of the United States; where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have spoken of the grant of power to the general government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress, and a State law came in conflict with it. In cases of this kind, the power \*586] of Congress undoubtedly excludes \*and displaces that of the State; because wherever there is collision between them, the law of Congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned is a striking example; for there the language of the court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

The judgment of the State courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

Mr. Justice McLEAN.

*Thurlow v. The Commonwealth of Massachusetts.—Error from the State Court.*

The plaintiff was indicted and convicted under the Revised Statutes of Massachusetts, chapter 47, and the act of 1837, chapter 242, for selling foreign spirits, in 1841 and 1842, without a license.

The third section of the revised act provides that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, "under the penalty of twenty dollars." The seventeenth section authorizes the county commissioners to grant licenses; and the second section of the act of 1837 provides, that nothing contained in that act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted."

On the trial in the Court of Common Pleas it was objected that a part of the spirits sold were foreign; but the court instructed the jury that such sale was in violation of the statute, which was not inconsistent with the constitution or revenue laws of the United States. On this ruling of the court an exception was taken, and the cause was removed to the Supreme Court of the State of Massachusetts, which overruled the exception, and entered a judgment on the verdict against the defendant.

\*The acts of Congress authorize the importation of spirits in casks of fifteen gallons, and wine in bottles. [\*587

The great question in this case is, whether the license laws of Massachusetts are repugnant to the constitution of the United States, or the revenue laws which have been enacted under it.

And, first, it is insisted that they are unconstitutional, as they prohibit the importer from selling an article that he is authorized to import, without the payment of an additional duty, or impost, which the State cannot impose.

The case of *Brown v. The State of Maryland*, 12 Wheat., 419, is supposed to be conclusive upon this point. This may be admitted, and yet it does not rule the case before us.

Brown was charged with having imported and sold a package of dry goods without a license. An act of Maryland required all importers, before the sale of their imported articles,

to take out a license. And the court held, "that a tax on the sale of an article, imported only for sale, is a tax on the article itself";—"that the importation gave a right to the importer to sell the package in question free from any charge by the State, and consequently that the act of Maryland was unconstitutional and void, as being repugnant to that article of the constitution which declares, that no State shall lay an impost or duties on imports or exports."

The act was also held to be repugnant to that clause in the constitution which "empowers Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In *Brown's case* the reasoning of the court and their decision turned upon the fact, that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken, and remained the property of the importer.

The plaintiff, Thurlow, asserts no right as an importer of the article sold. He purchased it in the home market; consequently neither the general reasoning nor the ruling of the court in *Brown's case* can control this one.

The tenth amendment of the constitution declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Before the adoption of the constitution, the States possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each State might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government.

Among the delegated functions it is declared, that "Congress shall have power to regulate commerce with foreign nations, and \*among the several States, and with the \*588] Indian tribes." This investiture of power is declared by this court, in the case of *Gibbons v. Ogden*, 9 Wheat., 1, and also in *Brown v. The State of Maryland*, "to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution."

There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the federal and State governments. The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers



not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

The power to tax is common to the federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict of jurisdiction. The conflicts which have arisen are mainly attributable to the want of an accurate definition and a clear comprehension of the respective powers of the two governments. In a system of government so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and State powers.

The powers expressly prohibited to the States are few in number, and are specified in the constitution. Those which are exclusively delegated to the federal government, and consequently, by implication, are prohibited to the States, are more numerous.

The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over every thing connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its constitution they have existed in Massachusetts. A great \*moral reform, which enlisted the judgments and excited the sympathies of the public, [\*589 has given notoriety to this course of legislation, and extended it, lately, beyond its former limit. And the question is now raised, whether the laws under consideration trench upon the power of Congress to regulate foreign commerce.

These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of *Brown v. Maryland*, it is admitted that the license acts cannot operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remain in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws. This is the predicament of the spirits in question.

A license to sell an article, foreign or domestic, as a merchant, or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business, or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise, or spirits, at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But, if this were the effect of the license, would that make the acts unconstitutional?

The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or any thing which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others.

From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to

carry \*infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. [\*590 These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State.

The objection is strongly and confidently urged, that a license may be refused under these laws, which would, in effect, prevent importation, as importation is only made to sell.

It is admitted that a State law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the act of Congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a State. But a State has a right to regulate the sale of this, as of every other imported article, out of the hands of the importer.

The license system, as adopted in all the States, restrains persons from selling by retail, who have not taken a license; and a license to retail spirits is granted by the court, or some other body, at its discretion, and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town, as a person of good moral character. Should this recommendation be refused improperly or unjustly, an appeal is given to the commissioners of the county. But the commissioners are not required to grant any licenses, "when, in their opinion, the public good does not require them to be granted."

There is no evidence in the record of a refusal to grant a license in this case. The plaintiff is charged with selling without a license; but it nowhere appears that he ever applied for one. This would seem to be conclusive. For if a State have a right to regulate the retail of foreign spirits, no one can retail them where a license is required without it. Now, that a State may do this no one doubts. And it is equally clear, if the plaintiff rests upon a prohibition to sell, it must be shown. This does not appear on the face of the law, and if, in the exercise of their discretion, the commissioners have refused all licenses, that is a matter of fact which must be established. On this ground alone, admitting the force of the arguments for the plaintiff, his case must fail.

But, not to rest the decision of so important a question on a defect of proof, we will consider the case as if the fact of refusal to grant the license were in the record.

The necessity of a license presupposes a prohibition of the right to sell as to those who have no license. For if a State may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the \*591] public good may seem to require. \*This is believed to have been done under every system of licenses to retail spirits which has been adopted in the different States. And this limitation may, possibly, lessen the sale of the article. This may be the result of any regulation on the subject. But it constitutes no objection to the law. An innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold. Is this unconstitutional, because it may reduce the importation of the article? Such an argument would be so absurd as to be at once rejected by every sound mind. No one could fail to see that the injunction was laid for the maintenance of good order and good morals. To reject this view would make the excess of the drunkard a constitutional duty, to encourage the importation of ardent spirits.

Such an argument would be advanced by no one, and no one would question either the constitutionality or expediency of the law which prohibits an innkeeper from encouraging drunkenness. And yet in this simple proposition is the argument answered against the constitutionality of the laws in question.

A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the State.

It is said that the object of these laws is to prohibit the importation of foreign spirits. This is an inference which their language does not authorize. A license is only required to sell in less quantity than twenty-eight gallons. A greater quantity than this may be sold without restriction. But it is said, if the legislature may require a license for twenty-eight gallons, it may extend the limitation to three hundred gallons.

In answer to this it is enough to say, that the legislature

has not done what is supposed by the plaintiff's counsel it might do. But if the legislature cannot extend the license to twenty-eight gallons, what shall be the constitutional limit? By what rule shall it be ascertained? Shall a gallon, a quart, or a pint be the limit? This is altogether arbitrary, and must depend upon the discretion of the law-making power,—the same discretion that imposes a tax, defines offences and prescribes their punishment, and which controls the internal policy of the State. Will it be contended that the legislature cannot exercise the power, as it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is, power may be abused, therefore it cannot be exercised. What power dependent on human agency may not be abused?

\*In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretence of a police regulation, a State cannot counteract the commercial power of Congress. And yet, as has been shown, to guard the health, morals, and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still, it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case, when the State regulation has a salutary tendency on society, and is founded on the highest moral considerations.

The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a State. The former ceases when the foreign product becomes commingled with the other property in the State. At this point the local law attaches, and regulates it as it does other property. The

State cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the State, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When in the appropriate exercise of these federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the \*593] community, it must be \*maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety, and the moral energies of society, its prosperity is advanced.

In *McCullough v. The State of Maryland*, 4 Wheat., 428, this court say,—“It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.”

“The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confi-

dently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against abuse."

Believing the laws of Massachusetts to regulate licenses for the sale of spirituous liquors to be constitutional, I affirm the judgment in this case.

*Andrew Peirce, Jr., and Thomas W. Peirce, v. The State of New Hampshire.*

This is a writ of error to the Supreme Court of New Hampshire, on a judgment given by that court sustaining the validity of the act of that State, "regulating the sale of wines and spirituous liquors," "approved 4th July, 1838"; which is alleged to be in violation of the constitution of the United States, and the revenue acts of Congress made in pursuance thereof.

The first section provides, "that if any person shall, without license from the selectmen of the town, &c., sell any wine, rum, gin, brandy, or other spirits, in any quantity, &c., such person, so offending, for each and every such offence, &c., shall pay a sum not exceeding fifty dollars," &c. The indictment charged the defendants in the State court with having sold one barrel of gin without a license.

On the trial, it was proved that the barrel of gin was purchased by the defendants in Boston, brought coastwise to the landing at Piscataqua Bridge, and thence to the defendants' store in Dover, and afterwards sold in the same barrel.

The views expressed by me in the case of *Thurlow v. The State of Massachusetts*, at the present term, as regards the power of a State to require a license for the sale of spirituous liquors, apply equally to the present case. A State may require a license to sell ardent spirits of domestic manufacture, as well as foreign. And the only difference between this case and the one above cited is, that the defendants imported this barrel of gin from the State of Massachusetts to that of New Hampshire, where they sold it; and they claim the right of importers to sell without a license.

In the case of *Brown v. The State of Maryland*, 12 Wheat., 449, after sustaining the right of the importer to sell a package of foreign goods without a license, which an act of Maryland required, the court say,—"It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State."

This remark of the court was incidental to the question before it, and the point was not necessarily involved in the

decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent chief justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case.

The power to regulate commerce among the several States is given to Congress in the same words as the power over foreign commerce. But in the same article it is declared, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And it is supposed that the declaration, "that no State, without the consent of Congress, shall lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," refers to foreign commerce.

A revenue to the general government could never have been contemplated from any regulation of commerce among the several States. Countervailing duties, under the Confederation, were imposed by the different States to such an extent as to endanger the confederacy. But this cannot be done under the constitution by Congress, in whom the power to regulate commerce among the States is vested.

The word *import*, in a commercial sense, means the goods or other articles brought into this country from abroad,—from another country. In this sense an importer is a person engaged in foreign commerce. And it appears that in the acts of Congress which regulate foreign commerce he is spoken of in that light. In *Brown v. The State of Maryland*, 12 Wheat., 443, the court say, the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States, until he has purchased it from the State." And it was upon the ground that the tax was an additional charge or impost upon the thing imported, \*595] \*which a State could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases, the transportation is only made a few feet or rods, and generally it is attended with little risk; and no duty is paid to the federal or State government. And why should property, when conveyed over a State line, be exempt from taxation which is common to all other property in the State?

There is no act of Congress to which the license law, as applied to this case, can be held repugnant. And the gen-



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eral "power in Congress to regulate commerce among the several States," under the restrictions in the constitution, cannot affect the validity of the law. The constitution prohibits impost duties on a commercial interchange of commodities among the States. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society.

The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of *Brown v. The State of Maryland*. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. One of the objects in adopting the constitution was, to regulate this commerce, and to prevent the States from imposing a tax on the commerce of each other. If this power has not been delegated to Congress, it is still retained by the States, and may be exercised at their discretion, as before the adoption of the constitution. For if it be a reserved power, Congress can neither abridge nor abolish it.

But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account \*of their having transported this property from Massachusetts to New Hampshire. I affirm the judgment of the State court

*Joel Fletcher v. The State of Rhode Island.*

This is a writ of error to the Supreme Court of Rhode Island, under the 25th section of the Judiciary Act of 1789. Fletcher was indicted for selling strong liquor, to wit, rum, gin, and brandy, in less quantity than ten gallons, in violation of the law of Rhode Island. From the evidence, it appeared that the brandy which he sold was purchased by him at Boston, in the State of Massachusetts, that it was imported into the United States from France for sale, and that the duties had been regularly paid at the port of Boston. The sale of the liquor was admitted by the defendant, as charged in the indictment.

In the defence it was insisted, that the license act was void, it being repugnant to that clause of the 8th section of the constitution of the United States which provides, "that the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay debts, and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States"; and is also repugnant to that clause of the 8th section which provides, "that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"; and also repugnant to that clause which declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, and the acts of Congress in pursuance of the aforesaid several clauses of said constitution," &c.

The Supreme Court of the State maintained the validity of the State statute, and to reverse that judgment this writ of error is prosecuted.

The opinions given by me in the cases of *Thurlow v. The State of Massachusetts*, and *Peirce et al. v. The State of New Hampshire*, decide, so far as I am concerned, this case. The first case related to the sale of spirits of foreign importation, not in the hands of the importer; the second, to domestic spirits transported from one State to another. And the indictment now under consideration relates to the sale of foreign spirits, purchased in Massachusetts and transported to Rhode Island. There is, however, one point made in this case, which was not embraced by the facts contained in either of the others. It was "agreed, that the town council of Cumberland, in Rhode Island, refused to grant any license for retailing strong liquors for a year from April, 1845, having

been instructed to that effect by a town meeting." The effect of this proceeding was to prohibit the sale of spirituous liquors in the town of Cumberland in less quantities than ten gallons.

\*There is no constitutional objection to the exercise of this discretion under the authority of the State law. [\*597 In the first place, no system of licenses to retail spirits has authorized the grant, except upon certain conditions. No one, it is presumed, can claim a license to retail spirits as a matter of right. Under the law of the State, a discretion is to be exercised, not only as regards the individuals who apply, but also as to the number that shall be licensed in each town. And, if it shall be determined that a certain town is not entitled to a license, it is not perceived how such a decision can be controlled. In the case of Fletcher, it seems that the town council, who have the power to make the grant, were influenced to refuse it by the popular vote of the town. A more satisfactory mode of instructing public officers, it would seem, could not be adopted.

This produces no restriction on the sale of spirits in any quantity exceeding ten gallons. And there is nothing in the record which shows that licenses are not granted in the adjacent towns within the State. But if this did appear, it would not avoid the force of the act. I think this regulation is clearly within the power of the State of Rhode Island, and, consequently, that the act is not repugnant to the constitution of the United States, or to any act of Congress passed in pursuance of it. I therefore affirm the judgment of the Supreme Court.

Mr. Justice CATRON.

*Peirce and another v. New Hampshire.*

Andrew Peirce and two others were indicted for selling one barrel of gin, contrary to a statute of New Hampshire, passed in 1838, which provides, that if any person shall, without license from the selectmen of the town where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each offence, on conviction upon an indictment, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of the county.

The barrel of gin had been purchased by the defendants at Boston, in the Commonwealth of Massachusetts, and was brought coastwise by water near to Dover, in New Hampshire, where it was sold in the same barrel and condition that it had

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been purchased in Boston. Part of the regular business of the defendants was to sell ardent spirits in large quantities.

The defendants' counsel contended, on the trial, that the statute of 1838 was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United \*598] States, and because it is \*repugnant to the two following clauses in the constitution of the United States, viz.:—

“No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”

“The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

In answer to these objections, the court instructed the jury, that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin.

The court further instructed the jury, that this statute, as it regarded this case, was not repugnant to the clause in the constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States.

The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The jury found the defendants guilty, and the Court of

Common Pleas fined them thirty dollars; from which they prosecuted their writ of error to the Superior Court of Judicature of New Hampshire, where the judgment was affirmed. The present writ of error is prosecuted, under the twenty-fifth section of the Judiciary Act of 1789, to reverse the judgment of the State court of New Hampshire, on the grounds above stated. And the question and the case presented for our consideration are, whether the State laws, and the judgment founded on them, are repugnant to the constitution of the United States. The court below having decided in favor of their validity, this is the only question that comes within our jurisdiction, although divers others were presented to and adjudged by the State court.

The importance of this case, as regards its bearing on the \*commerce among the States, and on the relations and [\*599 rights of their citizens and inhabitants, is not to be disguised. To my mind it presents most delicate and difficult considerations.

The first objection, that the statute of New Hampshire violated certain treaties with Holland, France, &c., providing for the admission of ardent spirits, has no application to the case, as the spirits sold were not foreign, but American gin.

The second objection relies on the first article and tenth section of the constitution, which provides, that "no State shall lay any imposts or duties on imports or exports, nor any duty on tonnage," unless with the assent of Congress, &c. These are negative restrictions, where the constitution operates by its own force; but as no duty or tax was imposed on the gin introduced into New Hampshire from Massachusetts, either directly or indirectly, these prohibitions on the State power do not apply.

The third objection proceeds on the clause, that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," to which it is insisted the State statute is opposed. The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the States; and "among" means between two only, as well as among more than two; if it was otherwise, then an intermediate State might interdict and obstruct the transportation of imports over it to a third State, and thereby impair the general power. The article in question was introduced from one State directly into another, and the first question is, Was it a subject of lawful commerce among the States, that Congress can regulate? That ardent

spirits have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the States of this Union recognizes them to be. But this condition of the subject-matter was met by the State decision on the ground, and on this only, "that the State might pass health and police laws which would, to a certain extent, affect foreign commerce and commerce between the States; and that the statute [of New Hampshire] was a regulation of that character, and constitutional."

This was the charge to the jury, and on it the verdict and judgment are founded, and which the State court of last resort affirmed. The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is \*600] admitted; and whenever a thing, from character or \*condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, *Brown v. The State of Maryland*, and *New York v. Miln*.

What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and

wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist.

If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated.

Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, \*as the power to regulate is dependent upon the power to fix [\*601 and determine upon the subjects to be regulated.

The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say, that the three States whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of

these States been exerted ; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result,—at least, in some of the States,—and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police.

Had the gin imported been “an import” from a foreign country, then the license law prohibiting its sale by the importer would be void. The reasons for this conclusion are given in my opinion on the case of *Thurlow v. The Commonwealth of Massachusetts*, and need not be repeated, and are founded on the case of *Brown v. The State of Maryland*. The next inquiry is, did it stand on the foot of “an import,” coming, as it did, from another State? If it be true, as the State courts held it was, that Congress has the exclusive power to regulate commerce among the States (the States having none), and the gin introduced being an article of commerce, and the State license law being a regulation of commerce (as it was held by this court to be in the case of *Brown v. The State of Maryland*), then the State law is void, because the State had no power to act in the matter by way of regulation to any extent.

This narrows the controversy to the single point, whether the States have power to regulate their own mode of commerce among the States, during the time the power of Congress lies dormant, and has not been exercised in regard to such commerce.

Although some regulations have been made by Congress affecting the coasting trade, requiring manifests of cargoes where they exceed a certain value, to prevent smuggling, and for other purposes, still, no regulation exists affecting, in any degree, such an import as the one under consideration. It must find protection against the State law under the constitution, or it can have none. This is also \*true as \*602] respects similar articles of commerce passing from State to State by land. Congress has left the States to proceed in this regard as they were proceeding when the constitution was adopted.

Is, then, the power of Congress exclusive? The advocates of this construction insist, that it has been settled by this court that the power to regulate commerce is exclusive, and can be exercised by Congress alone. And the inquiry in advance of further discussion is, Has the construction been thus settled? The principle case relied on is that of *Gibbons v. Ogden*, 9 Wheat., 1, in support of the assumption. In that case a monopoly had been granted to the inventors of ma-



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chinery propelled by steam, which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tide-waters, and for navigating these with two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the State courts of New York; and in his answer he relied on licenses granted under the act of 18th February, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defence. The court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to, and part of, commerce.

After discussing many topics connected with, or supposed to be connected with, the subject, the power of taxation was considered by the court, and the powers to tax in the States and the United States compared with the power to regulate commerce, and in this connection the chief justice, delivering the opinion of the court, said,—“But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations Congress deemed proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations, and among the States, while Congress is regulating it?”

And then the court proceeds to discuss the effect of the licenses set up in Gibbon's answer, and gives a decree of reversal, on that sole question, in his favor. The decree says,—“This court is of opinion, that the several licenses to the steamboats the Stoudinger and the Bellona to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer, which were granted under an act of Congress passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate \*the waters of the United States, by steam or [\*608 otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding.” And then the State law is declared void, as

repugnant to the constitution and laws of the United States. 9 Wheat., 240.

This case, then, decides that navigation was within the commercial power of the United States, and that a coasting license granted pursuant to an act of Congress, in the exercise of the power, was an authority under the supreme law to navigate the public waters of New York, notwithstanding the State law granting the monopoly. This decision was made in 1824. Three years after (1827) the case of *Brown v. The State of Maryland* came before the court. 12 Wheat., 419.

Brown, an importing merchant, had been indicted for selling packages of dry goods in the form they were imported, without taking out a license to sell by wholesale. To this he demurred, and the demurrer was sustained, on the ground that "imports" could be sold by the importer regardless of the State law, on which the indictment was founded. Two propositions were stated by the court, and the decision of the cause proceeded on them both, and was favorable to Brown:—First, The provision of the constitution which declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." And, second, That which declares Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The first proposition has no application to the controversy before us, as here no tax or duty was imposed.

2. The court proceeds (p. 446) to inquire of the extent of the power, and says,—“It is complete in itself, and acknowledges no limitations, and is coextensive with the subject on which it operates.” And for this *Gibbons v. Ogden* is referred to, as having asserted the same postulates. The opinion then urges the necessity that Congress should have power over the whole subject, and the power to protect the imported article in the hands of the importer, and proceeds to say,—“We think it cannot be denied what can be the meaning of an act of Congress which authorized importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser.” “We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.”

Two points were decided on the second proposition:—1st. That a tax on the importer was a tax on the import.

2d. That “an import,” which had paid a tax to the United States according to the regulations of commerce made by

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Congress, could not be taxed a second time in the hands of the importer.

Neither of these cases touch the question of exclusive power, nor \*do I suppose it was intended by the [\*604 writer of the opinions to approach that question, as he studiously guarded the opinion in the leading case of *Gibbons v. Ogden* against such an inference, and professedly followed the doctrines there laid down in *Brown v. The State of Maryland*.

The next case that came before the court was that of *Willson et al. v. The Blackbird Creek Marsh Company*, in 1829, 2 Pet., 257. The chief justice again delivered the opinion of the court, as he had done in the two previous cases. The company was authorized to make a dam across the creek under a State charter. The creek was a navigable tide-water; the dam was constructed, and the licensed sloop of Willson not being enabled to pass, he broke the dam, and the company sued him for damages; to which he pleaded, that the creek was a navigable highway, where the tide ebbed and flowed, and that he only did so much damage as to allow his vessel to pass. The plea was demurred to, and there was a judgment against Willson in the State court. It was insisted on his behalf in this court that the power to regulate commerce included navigation; and that navigable streams are the waters of the United States, and subject to the power of Congress; and the case of *Gibbons v. Ogden* was relied on. The chief justice in the opinion said:—"The counsel for the plaintiff in error insists that it comes in conflict with the powers of the United States to regulate commerce with foreign nations, and among the several States.

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying, that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant

state, or as being in conflict with any law passed on the subject."

Here the adjudications end. But judges, who were of the court when the three cases cited were determined, differ as to the true meaning of the chief justice in the language employed in the case of *Gibbons v. Ogden*, in illustrating the constitution in aspects supposed to bear more or less on the questions before the court; such, for instance, as that the commercial power was a unit, and covered the entire subject-matter of commerce with foreign nations and \*among \*605] the States; and that navigation was included in the power. In the case of *New York v. Miln*, 11 Pet., 102, Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in *Gibbons v. Ogden* meant, in regard to the true exposition of the constitution;—one contending that the language used had reference to the power of Congress, and to a case where it had been fully exercised; the other insisting that the opinion maintained the exclusive power in Congress to regulate commerce, and that the States had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I think it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of *Willson v. The Blackbird Creek Marsh Company*. And as this case was an adjudication on the precise question whether the constitution of the United States, in itself, extinguished the powers of the States to interfere with navigation on tide-water, and as it was adjudged, in the case of *Gibbons v. Ogden*, that the power to regulate commerce included navigation as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the States, until Congress shall act on the same subject and suspend the State law in its operation. But, owing to the conflicting opinions of individual judges, it is deemed proper to treat the question as though it was an open one, in the aspect that this case presents it; and then the consideration arises,—Can a State, by its general laws, operating on all persons and property within its jurisdiction, regulate articles coming into the State from other States, and prohibit their sale, unless a license is obtained by the person bringing them in; and where no tax or duty is demanded of the person, or imposed on the article?

In this proposition, it is not intended to involve the consideration, that where Congress regulates a particular com-

merce by general laws, as where a tax is levied on some articles on being introduced from abroad, and others permitted to come in free, that all are regulated; this I admit in the instance put, and in all others of a like character. But as no General law of Congress has regulated commerce among the States, such a rule cannot apply here.

To a true understanding of the power conferred on Congress to regulate commerce among the States, it may be proper briefly to refer to their condition and acts before the constitution was adopted, in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly; and to secure themselves from undue and opposing taxes, the constitution first provides, that Congress shall lay no tax on articles exported from any State; second, that no State shall lay any imposts or duties on imports or exports; nor, third, lay any duty or tonnage, without \*the consent of Congress, except so much as may be necessary for executing its inspection laws. These are [\*606 prohibitions, to which the States have conformed.

But, as many general and all necessary local regulations existed when the constitution was adopted, and this, in all the States, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the constitution left them in force. And they have been added to and accumulated to a great extent up to this time in the maritime States, not only as regards commerce among the States, but affecting foreign commerce also; the States, within their harbours and inland waters, have done almost every thing, and Congress next to nothing. So minute and complicated are the wants of commerce when it reaches its port of destination, that even the State legislatures have been incapable of providing suitable means for its regulation between ship and shore, and therefore charters, granted by the State legislatures, have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a State must have peculiarity in its regulations; and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations, as the States do. The difficulties standing in the way of Congress are fast increasing with the increase of commerce and the places where it is carried on. And where it enters States through their inland borders, by land and water, the complication is not less, and especially on the large rivers. There, too, Congress has the undisputed power to regulate commerce coming from State to State; but as every village would require special legislation, and constant additions as it

grew and its commerce increased, to deal with the subject on the part of Congress would be next to impossible in practice. I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision. And this state of things was too prominently manifest for the convention to overlook it. Nor do I suppose they did so, for the following reasons.

The general rules of construction applicable to the negative and affirmative powers of grant in the constitution are commented on in the 32d number of the *Federalist*, in these terms:—"That, notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I \*607] have advanced, and \*refutes every hypothesis to the contrary." That is, in favor of the State power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the constitution, then before them for adoption by the State conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the States as the true exponents of the instrument submitted for their ratification. Proceeding on the principle of construction applicable to affirmative statutes,—that they stood together as a general rule, if there were no negative words,—and taking the doctrine laid down in the *Federalist* to be the true rule of interpretation,—that where the States were intended to be prohibited negative words had been used,—the States continued to do what they had previously done, and were not by negation prohibited from doing; that is to say, to exercise the powers conferred on Congress in arming, and organizing, and disciplining the militia, to pass bankrupt laws, and to regulate the details of commerce within their limits, coming from other States and foreign countries.

The exercise of the powers to regulate the militia, and to pass bankrupt laws, has met the approval of this court in the cases of *Houston v. Moore*, and in *Ogden v. Saunders*.

As to the existence of the power in the States in these two instances, there is no further controversy here or elsewhere.

And in regard to the third, Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject, and on no better assumption than that Congress and the State legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

And as Congress and the Courts have conceded that the States may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative grants of power to Congress in these instances did not deprive the States from exercising the power until Congress acted, it is now too late, under existing circumstances, for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress; as it could no more be done with consistency of interpretation, than with safety to the existing state of the country.

\*In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty [\*608 will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the States have any right to complain. And so the courts can interfere if the States assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

The case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the State license law was void, as respects spirits coming in from other

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States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighbouring States having similar license laws to those of New Hampshire.

For the sake of convenience, the views on which this opinion proceeds will be briefly restated.

1. It is maintained, that spirits and wines are articles belonging to foreign commerce and commerce among the States; and that Congress can regulate their introduction and transmission into and through the States so long as they belong to either class of such commerce, but no further.

2. That any State law whose provisions are repugnant to the existing regulations of Congress (within the above limit) is void, so far as it is opposed to the legislation of Congress.

3. That the police power of the States was reserved to the States, and that it is beyond the reach of Congress; but that such police power extends to articles only which do not belong to foreign commerce, or to commerce among the States, at the time the police power is exercised in regard to them; and that the fact of their condition is a subject proper for judicial ascertainment.

4. That the power to regulate commerce among the States may be exercised by Congress at pleasure, and that the States cut off from regulating the same commerce at the same time it stands regulated by Congress; but that, until such regulation is made by Congress, the States may exercise the power within their respective limits.

5. That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the State law was constitutionally passed, because \*609] of the power of the State thus \*to regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

And, for these reasons, I think the judgment of the State court should be affirmed.

*Thurlow v. Massachusetts.*

The statute of Massachusetts provides, that no person shall presume to be a retailer or seller of wine, brandy, rum,



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or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offence.

The plaintiff, Thurlow, was found guilty by a jury for violating this law, on which verdict the Supreme Judicial Court of Massachusetts pronounced judgment; and from which a writ of error was prosecuted to this court under the twenty-fifth section of the Judiciary Act of 1789. The bill of exceptions shows that some of the sales charged in the indictment were of foreign liquors; in regard to which the court directed the jury that the license law applied as well to imported spirits as to domestic. It was proved that the defendant below had sold in quantities of gallons, quarts, and pints. And the question submitted for our consideration is, whether the State law, and the judgment founded on it, are repugnant to the acts of Congress authorizing the importation of wines, brandies, and other foreign spirits; and it is proper to remark, that our jurisdiction and power to interfere involve the question merely of repugnance or no repugnance; if repugnance is found to exist, we must reverse, and if not, we must affirm. It follows, that the judicial ascertainment of the fact will end the controversy.

For the plaintiff in error it is insisted, that the State law and the judgment founded on it are repugnant to the acts of Congress authorizing the importation of foreign wines and spirits, and to their introduction into the United States on paying a prescribed tax. That the laws of the States cannot control the retail trade in such liquors; that if they can to any extent, they may prohibit their sale altogether, and by this means do that indirectly which cannot be done directly, that is to say, prohibit their introduction; that the purposes of wholesale importation being retail distribution, the two must go together; if not, the first is of no value; that importations reach our country in large masses for the sole purposes of diffusion and consumption, and unless Congress has the control of distribution until the imported article reaches the consumer, the power to admit and to regulate commerce in regard to it will be worthless, and little better than a barren theory, leaving us where we began in 1789. That any law, therefore, that prohibits consumption necessarily destroys importation; and the retail process being the ordinary means <sup>to</sup> consumption, and indispensable to it, to refuse this means would wholly defeat the end Congress has protected; that is to say, consumption. On the

soundness of this reasoning, the result of the controversy depends.

To this argument we answer, that under the power to regulate foreign commerce, Congress can protect every article belonging to foreign commerce, so long as it does belong to it, from the operation of a tax or a license, imposed by a State law, that obstructs or hinders the commerce. But the true inquiry here is, how long does the imported article so continue? The acts of Congress protect "imports," and prescribe the quantity and measure in which they shall be made; the question of more or less is within the competency of Congress, but how long the imported article continues to be "an import" is a different question, for so soon as it ceases to be so, then it is beyond the power conferred on Congress "to regulate foreign commerce," and that power cannot afford it further protection. This is the line of jurisdiction where the powers of Congress end, and where the powers of the States begin, when dealing respectively with the imported article. And such is the limit established in the case of *Brown v. The State of Maryland*. I do not mean to say that Congress may not protect an import for the purposes of transmission over land, in the form it was imported, from one State to another, for the purposes of distribution and sale by the importer, as this can be done under the power to regulate commerce among the States. The question under examination is, not what Congress may do, but what it has done. It has not permitted spirituous liquors to be imported in the quantities that they were sold by the plaintiff in error. And when the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption, or is divided into smaller quantities, by breaking up the casks, packages, &c., by the importer, the article ceases to be a protected "import," according to the legislation of Congress as it now stands, and therefore the liquors sold in this instance did not belong to "foreign commerce," when sold at the retail house by single gallons, quarts, &c. When thus divided and sold in the body of the State, the foreign liquors became a part of its property, and were subject to be taxed, or to be regulated by licenses, like any other property owned within the State.

But while foreign liquors, imported according to the regulations of Congress, remain in the cask, bottle, &c., in the original form, then the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing

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so ; nor does it make any difference whether the imported article paid a tax on its introduction, or was admitted as a free article ; until it passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected.

\*It follows from the principles stated, that the spirituous liquors sold by the defendant stood on no higher [\*611 ground than domestic spirits did, and that domestic spirits are subject to the State authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the twenty-fifth section of the Judiciary Act.

I admit as inevitable, that, if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy ; and that if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined. The reasons are obvious. We have no power to inquire into abuses (if such there be) inflicted by State authority on the inhabitants of the State, unless such abuses are repugnant to the constitution, laws, or treaties of the United States.

For the reasons above set forth, I think the judgment of the State court should be affirmed.

And as the case of Joel Fletcher against the State of Rhode Island depends on the same principles, to every extent, I think it must be affirmed also.

Mr. Justice DANIEL.

In the decision of the court, so far as it establishes the validity of the license laws of the States of Massachusetts, Rhode Island, and New Hampshire, I entirely concur ; and had the opinions of judges in forming that decision been limited strictly to an inquiry into the compatibility of those laws with the constitution of the United States, or with a just exercise of State power (the only inquiry, in my apprehension, regularly before the court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfilment of their own convictions, have seemed to me to go beside the questions regularly before them, and in this departure have propounded principles and propositions, against which, whensoever they may be urged as motives for

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action on my part, I shall feel myself bound most earnestly to protest. It has been said, that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may in the first place be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent.\*

\*612] \*But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this,—that in matters involving the meaning and integrity of the constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay-writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum*. I, too, have been sworn to observe and maintain the constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate. Could I, in cases of minor consequence, consent, in deference to others, to pursue a different course, I should, in instances like the present, be especially reluctant to place myself within the description of the poet,—“*Stat magni nominis umbra*.”

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulgated in the reasoning of this court in the case of *Brown v. The State of Maryland*, reported in 12 Wheat., 419,—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the constitution which confers on Congress the power of regulating commerce with foreign nations, &c., &c., and by the farther provision which prohibits to the States the power of levying imposts or duties on imports, merchandise, or property imported from abroad,—however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively, and undeniably it shall have become the property,

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\* See 12 Wheat., 449, the opinion of Thompson, Justice.

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and passed into the possession, of the citizen resident within the State, and protected both in person and property by the laws of the State,—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the court) it shall have been “broken up and mingled with the general mass of property.”

With regard to this phrase, “broken up and mingled with the mass of property,” so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted, that a person may import a steam-engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the \*general mass of property. If, then, this phrase is to be apprehended [\*613 as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home.

By the 6th article and 2d clause of the constitution it is thus declared:—“That this constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land.”

This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for

there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a State and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States. Let us test by these principles—believed to be irrefragable—the power over foreign commerce vested in Congress by the constitution; and also the positions sought to be deduced from that grant of power by the argument in *Brown v. The State of Maryland*. By art. 1, § 8, clause 4, of the constitution, it is declared, "that Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." 'Tis with the first of the grants in this article that \*614] we have now to deal. The commerce here \*spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries; keeping in view always the essential characteristic of this commerce as stamped upon it by the constitution, namely, that it is commerce with foreign nations, or, in other words, that it is external commerce. By this, however, is not meant that it should be external in reference to geographical or territorial lines, but in reference to the parties, and the nature of their transactions. The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may as foreign commerce be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. Independently of an express prohibition upon the States to lay duties on imports, this power of regulating foreign commerce may correctly imply a denial to the States of a right to interfere with existing regulations over subjects of foreign commerce; but they

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must be continuing, and still in reality, subjects of foreign commerce, and such they can no longer be after that commerce with regard to them has terminated, and they are completely vested as property in a citizen of a State, whether he be the first, second, or third proprietor; if this were otherwise, then, by the same reasoning, they would remain imports, or subjects of foreign commerce, through every possible transmission of title, because they had been once imported. Imports in a political or fiscal, as well as in common practical acceptation, are properly commodities brought in from abroad which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which still are subject to the power of the government for a fulfilment of the conditions upon which they have been admitted to entrance; as, for instance, goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece, or yard, or by hogsheads, casks, or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape, or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter. The \*objection, that a tax upon an article in bulk (the property of a citizen) is forbidden [\*615 because it is a burden on foreign commerce, whilst a similar burden is permissible on the very same bulk or on fragments of the same article in the hands of his vendee, it would appear difficult to reconcile with sound reasoning. Every tax is alike a burden, whether it be imposed on larger or smaller subjects, and in either mode must operate on price, and consequently on demand and consumption. If, then, there was any integrity in the objection urged, it should abolish all regulations of retail trade, all taxes on whatever may have been imported.

It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the constitution; and, I

would add, with some regulation actually established by Congress in virtue of that power. In the case of *Brown v. The State of Maryland*, it is said by the court, that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies on the part of the States a duty to encourage, if not to enforce, the consumption of foreign merchandise; arising, it is affirmed, from a farther duty incumbent on the States to regard *a priori* the acts of the federal government as wisest and best, and therefore imposing an obligation on the States for coöperation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words, or any correct theory of the constitutional powers of Congress. It cannot be necessary here to institute a criticism upon the words *importation*, *sale*, *consumption*, in order to show either their etymological or ordinary acceptation, or in order to expose the fallacy of the foregoing new and startling theory. Goods, moreover, may be imported into a country as into a commercial *entrepôt*, for reshipment to other markets, and not for consumption at all. But where importation may have been made with the direct view to sell, it does not follow, by necessary induction, that permission for the former implies permission for the latter, nor the power of granting the former the power of conferring the latter; much less, that it implies the power or the obligation on the part of the government to command or insure a sale. Whatever might be the case under governments in which power is either absolute or single, it is wholly otherwise under our system of confederated sovereignties. Here the power of the general government is emphatically delegated and limited, although it is paramount so far as it has been delegated; and when we look for this power of the government in relation to this matter in the constitution, we find it the power to regulate \*616] commerce with foreign nations; it \*being the foreign character of that commerce alone which confers on Congress any power whatsoever with respect to it. It has been urged, that the importer pays a duty to the government for permission to introduce and vend his merchandise; that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may, in the first place, be replied, as has been remarked in the argument at the bar, that the question here is one of constitutional



power; and if the federal government shall have transcended its legitimate powers, I ask, can it be right, in any view, to compensate those who may have suffered by the transgression, by authorizing unlimited reprisals upon the States? But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities; but he has not purchased and cannot purchase from the government that which it could not insure to him, a sale independently of the laws and polity of the States. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise,—the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale.

The want of integrity in the argument under examination is farther exposed, by showing that it will not cover the conclusion sought to be drawn from it. If the right of the importer to vend, and his exemption from taxation, are made to rest on the payment of duties to the federal government, on what foundation must be rested his right and his exemption, in reference to articles on which duties are neither paid nor exacted? Are these to be left exclusively the subjects of State regulation and State taxation? That they must be so left is a logical and inevitable conclusion from the proposition that the right to vend flows from the payment of duties. And then this argument involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely—nay, whose introduction is in effect invited and solicited by the federal government—may be burdened by the States at pleasure.

It has been insisted, that, as by treaty stipulations articles of foreign merchandise have been admitted for consumption (and much stress is laid upon this expression) in certain specified \*quantities, consequently by such stipulations, forming the supreme law of the land, the free [\*617 sale of these articles must be an absolute right. In what instances a treaty is or is not the supreme law, or is no law

at all, I have already endeavoured to distinguish. Passing, therefore, that investigation, it seems very clear that the proposition just adverted to involves a great fallacy. The treaty stipulations here exemplified mean this, and nothing more, namely, that whereas certain enumerated commodities could heretofore be imported only in greater quantities, for the use of those who might choose to buy and consume them, they may hereafter be imported in lesser quantities. These stipulations no more signify that commodities shall be circulated and used free of all internal regulation, than they convey a positive mandate for their being purchased and consumed, eaten and drunk, *nolens volens*, or at all events. Every State that is in any sense sovereign and independent possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue and under the protection of its own laws, whether that control be exerted in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived. Such a power differs entirely from an authority essentially extraneous in its character,—an authority limited and specific, by the very terms which confer it; restricted to action upon the progress of property on its way to complete investment under the laws of the State.

The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority.

These laws are, therefore, in violation neither of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution. Viewing them in this character, my coöperation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. But since, whilst extending to these laws their sanction and support, there have been advanced by others principles and opinions

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which to me appear to have their source not in the fountain of all legitimate power in this or any other department of the federal government, I cannot by silence seem to assent to those principles \*and opinions, nor put from me the [\*618 obligation of declaring my dissent from them.

Mr. Justice NELSON concurred in the opinions delivered by the Chief Justice and Mr. Justice Catron.

Mr. Justice WOODBURY.

I concur in the conclusion of my brethren as to the judgment which ought to be pronounced in all of the three license cases.

But, differing in some of the reasons for that judgment, and in the limitations and extent of some of the principles involved, and knowing the cases to possess much interest in the Circuit to which I belong, and from which they all come, I do not feel at liberty to refrain from briefly expressing my views upon them.

The paramount question involved in all the cases is, whether license laws by the States for selling spirituous liquors are constitutional. It is true that several other points are raised, as to evidence, the power of juries in criminal prosecutions to decide the law as well as the facts, and other questions not connected with the overruling of any clause in an act of Congress, or treaty, or the constitution, which was interposed in the defence. But, confined as we are to these last considerations in writs of error to State courts, it would be travelling out of our prescribed path to discuss at all either the other questions just alluded to, or some which have been long and ardently agitated in connection with this subject; such, for instance, as the expediency of the license laws, or the power of a State to regulate in any way the food and drink or clothing of its inhabitants. Fortunately, those questions belong to another and more appropriate forum,—the State tribunals.

But, looking to the relations which exist between the general government and the different State sovereignties, the question, whether the laws in these cases are within the power of the States to pass, without an encroachment on the authority of the general government, is one of those conflicts of laws between the two governments, involving the true extent of the powers in each as regards the other, which is very properly placed under our revision. In helping to discharge that duty on this occasion, I carry with me, as a controlling principle, the proposition, that State powers, State

rights, and State decisions are to be upheld when the objection to them is not clear, equally proper as it may be for them, when the objection is clear, to give way to the supremacy of the authorized measures of the general government. See Constitution, art. 3.

It is not enough to fancy some remote or indirect repugnance to acts of Congress,—a “potential inconvenience,”—in order to annul the laws of sovereign States, and overturn the deliberate decisions of State tribunals. There must be an actual collision, a direct inconsistency, and that depre-  
\*619] cated case of “clashing \*sovereignties,” in order to demand the judicial interference of this court to reconcile them. *McCulloch v. Maryland*, 4 Wheat., 316, 487; 1 Story, Com. on Const., 432.

These cases present two leading facts in respect to the material points, which ought first to be noticed. Neither of them is a prosecution against the importer of spirit or wine from a foreign country; and in neither has a duty been imposed, or a tax collected by the State from the original defendant, in connection with these articles. From this state of things, it follows, that, however much has been said as to the collision between these license laws and some former decisions of this court, no such direct issue is made up in either of them.

The case usually cited in support of such a proposition is very different. It is that of *Brown v. Maryland*, 12 Wheat., 419, which was a tax or license required, before the sale of an article, from the importer of it from a foreign country; and it was an importer alone who called the constitutionality of the law in question. What do these statutes, then, really seek to do? They merely attempt to regulate the sale of spirit or wine within the limits of States, in regard to the quantity sold at any one time without a license from the State authorities,—as in the cases from Massachusetts and Rhode Island; and in regard to any sale whatever without such license,—as in the case from New Hampshire.

It is true, also, that the quantity allowed to be sold in Massachusetts at any one time, without a license, is not so small as that which is permitted by Congress to be imported in kegs, and in Rhode Island is greater than that which Congress permits to be imported in bottles, and in New Hampshire is no quantity whatever. Yet neither of the laws unconditionally prohibits importations. Indeed, neither of them says any thing on the subject of importations. The first inquiry then recurs, whether they do not all stand on the same platform in respect to this, and without conflicting

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in this respect with any act of Congress. My opinion is that they do; as none of them, by prohibiting importations, oppose in terms any act of Congress which allows them, and none seem to me to conflict, in substance more than form, with entire freedom on that subject. Nor in either case do they, in point of fact, amount to a prohibition of importations in any quantity, however small. Under them, and so far as regards them, importations still go on abundantly into each of those States. It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore. In the next place, in point of fact, neither of the laws goes so far as to prohibit in terms the sales, any more than the imports, of spirits. \*On looking at the laws, this will be conceded. But if such a prohibition existed as to sales, [\*620 what act of Congress would it come in collision with? None has ever been passed which professes to regulate or permit sales within the States as a matter of commerce. A good reason exists for this, as the subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power.

And what power or measure of the general government would a prohibition of sales within a State conflict with, if it consisted merely in regulations of the police or internal commerce of the State itself? There is no contract, express or implied, in any act of Congress, that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective States. Nor can they expect to sell on any other or better terms than are allowed by each State to all its citizens, or in a manner different from what has comported with the policy of most of the old States, as well before as since the constitution was adopted. Any other view would not accord with the usages of the country, or the fitness of things, or the unquestioned powers of all sovereign States, and, as is admitted, even of those in this Union, to regulate both their internal commerce and general police. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohi-

bition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and, also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad. This was the paramount object in the law of Congress, so often cited, as to the importation of kegs of fifteen gallons of brandy,—to have them in proper shape to be reexported and carried on mules in Mexico, rather than to be sold for use here.

I should question the correctness of this objection even were it the doctrine in *Brown v. Maryland*, though I do not regard it as the point there settled, or the substantial reason for it. See Chief Justice Parker's Opinion in *The State of New Hampshire v. Peirce*, in Law Rep. for September, 1845. That point related rather to the want of power in a State to lay a duty on imports.

But it is earnestly urged, that, as these acts indirectly prohibit sales, such a prohibition of sales is indirectly a prohibition of importations, and importations are certainly regulated by Congress. It is necessary to scrutinize the grounds on which such circuitous reasoning and analogy rest. The sale of spirit being still permitted in all these States, as before \*621] remarked, it is first objected, that it is \*permitted in certain quantities only, except under license, and that this restricts and lessens both the sales and imports. But the leading object of the license is to insure the sales of spirit in quantities not likely to encourage intemperance, and at places and times, and by persons, conducive to the same end. This is the case in New Hampshire, where none can be sold without license, while in the two other States, if no license is granted, the owner may sell in ten or twenty-eight gallons at a time; and in all the three States, the owner may, without license, consume what he imports, or store and reexport it for a market elsewhere. So the laws of most of the States forbid sales of property on the Sabbath. But who ever regarded that as prohibiting there entirely either their imports or sales?

It is further argued, however, that the license laws accomplish indirectly what is hostile to the policy of Congress, and thus conflict with the spirit of its acts, as much as if they prohibited absolutely both importations and sales. But if effecting this at all, it must be because they tend to lessen, and are designed to lessen, the consumption of foreign spirits, and thus help to reduce the imports and sales of them.

The case from New Hampshire is in this respect less open

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to objection than the others, the spirit there having been domestic. But as it came in coastwise from another State, it may involve a like principle in another view; and in its prohibitory character as to selling any liquor without license, the New Hampshire statute goes farther than either of the others.

Now, can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional, or violates acts of Congress? For that is the essence of this point. So far from this, whatever promotes economy in the use or consumption of any articles is certainly desirable, and to be encouraged by both the State and general governments. Improvements of that kind by new inventions and labor-saving machinery are encouraged by patents and rewards. More especially is it sound policy everywhere to lessen the consumption of luxuries, and in particular those dangerous to public morals. So in respect to foreign articles, the disuse of them is promoted by both the general and State governments in several other ways, rather than treating it as unconstitutional or against the acts of Congress, though the revenue as well as consumption be thereby diminished. Thus, the former orders the purchase of only domestic hemp for the navy, when it can be obtained of a suitable quality and price (Resolution, 18 February, 1843, 5 Stat. at L., 648). And some of the States have often bestowed bounties on the growth of hemp, and of wheat, and other useful articles. An exception like this would cut so deep and wide into other usages and policy well established, as to need no further refutation. But this objection [\*622 is \*mixed up with another,—that the operation of these license laws is unconstitutional, because they lessen the amount of revenue which the general government might otherwise derive from the importation of that which is made abroad. It may be a sufficient reply to this, that Congress itself, by its own revenue system, has at times, by very high duties on some articles, meant to diminish their consumption, and reduce the revenue which otherwise might be derived from them if allowed to be introduced more largely under a small duty. And in this very article of spirits it has confessedly, from the foundation of the government, made the duties high, so as to discourage their use; and this in the very last tariff of 1846, though considered to be more emphatically a mere revenue measure. So its actual policy for fifteen years has been to lessen the use of spirit in both the army and navy; and by the third section of the act of Aug. 29th,

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1842, ch. 267 (5 Stat. at L., 546), this policy is recognized and encouraged by law.

So, when resorting to internal duties, for a like reason in part, stills and the manufacture of whiskey have been the first resorted to, and at last, in order to discourage the making of molasses into New England rum, the drawback on the former when manufactured into spirit and exported is allowed to stand now on a footing much less favorable than that on sugar when refined and exported.

Again, where States look to the most proper objects of domestic taxation, it is perfectly competent for them to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens; and it ever has been done, however it may discourage the use of the former, or lessen the revenue which might otherwise be derived from them by the general government, or tend to reduce imports, as well as restrict the sale of them when considered of a dangerous character.

The ground is, therefore, untenable entirely, that a course of legislation which serves to discourage what is foreign, whether it be by Congress or the States, is for that reason alone contrary to the constitution, even if it tend at the same time to reduce the amount of revenue which would otherwise accrue from foreign imports, or from those of that particular article.

Importations, then, being left unforbidden in all of these cases, and the right to sell with a license not being prohibited in any of them,—nor without one prohibited, except qualifiedly in two of them, and in the other absolutely, but not affecting foreign imports at all in that case, as the spirit sold there was of domestic manufacture,—I pass to the next constitutional objection.

It has been contended, that the sum required to be paid for a license, and the penalty imposed for selling without one, are in the nature of a duty on imports, and thus come within the principle really settled in *Brown v. Maryland*, and thus conflict with the constitution. It is conceded, that a \*623] State is forbidden “to lay any \*impost or duties on imports” without the assent of Congress. (Art. 1, § 10.) But neither of these statutes purports to tax imports from abroad of foreign spirits, or imports from another State, either coastwise or by land, of either foreign or domestic spirits. The last mode is not believed to be that referred to in the constitution, and no regulation has ever been made by Congress concerning it when consisting of domestic spirits,



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as in the case of New Hampshire, except with a view to prevent smuggling. Act of Congress, Sept. 1, 1789, ch. 11, § 25, and Feb. 18, 1793, ch. 8, § 14; 1 Stat. at L., 61, 309.

Nor does either of those statutes purport to tax the introduction of an article by the merchant importing it, much less to impose any duty on the article itself for revenue, in addition to what Congress requires. Neither of them appears to be, in character or design, a fiscal measure. They do not touch the merchandise till it has become a part of the property and capital of the State, and then merely regulate the disposal of it under license, as an affair of police and internal commerce. They might then even tax it as a part of the commercial stock in trade, and thus subject it, like other property, to a property tax, without being exposed to be considered an impost on imports, so as to conflict with the constitution. But the penalty and license in these cases are imposed *diverso intuitu*, and not as a tax of any kind. Hence they operate no more in substance than in form, as an impost of the prohibited character.

There is no pretence that the penalty is for revenue; and if the small sum taken for a license should ever exceed the expense and trouble of supervising the matter, and become a species of internal duty or excise, it would operate on spirit made in the State as well as that made elsewhere, and on others as well as importers, and, like any State tax on local property, or local trade, or local business, be free from any conflict with the constitution or acts of Congress. And what seems decisive in these causes as to this aspect of the question is, that neither of the persons here prosecuted was in fact an importer of foreign spirit or wines, or set up a defence of that kind as to himself, on the trial, which was overruled in the State courts.

Nor can the proposition, sometimes advanced, be vindicated, that this license, if a tax, and falling at times on persons not citizens, whether they belong to other States or are aliens, is either unjust or unconstitutional. It falls on them only when within the limits of the State, under the protection of its laws and seeking the privileges of its trade, and only in common with their own citizens. Such taxes are justifiable on principles of international law (Vattel, B. 8, ch. 10, § 132), and I can find no clause in the constitution with which they come in collision.

Again; it has been strenuously insisted on in these cases, and perhaps it is the leading position, that these license laws are virtually \*regulations of foreign commerce; and hence, when passed by a State, are exercising a power

exclusively vested in the general government, and therefore void. This is maintained, whether they actually conflict with any particular act of Congress or not. But, dissenting from any such definition of that power, as thus exclusive and thus abrogating every measure of a State which by construction may be deemed a regulation of foreign commerce, though not at all conflicting with any existing act of Congress, or with any thing ever likely to be done by Congress, I shall not, on this occasion, go at length into the reasons for my dissent to the exclusive character of this power, because these license laws are not, in my opinion, regulations of foreign commerce, and in a recent inquiry on the circuit I have gone very fully into the question. *The United States v. New Bedford Bridge*, in Massachusetts District.

My reasons are in brief,—

1. The grant is in the same article of the constitution, and in like language, with others which this court has pronounced not to be exclusive, e. g. the regulation of weights and measures, of bankruptcy, and disciplining the militia.

2. There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the States. But I admit, that, so far as regards the uniformity of a regulation reaching to all the States, it must in these cases, of course, be exclusive; no State being able to prescribe rules for others as to bankruptcy, or weights and measures, or the militia, or for foreign commerce. A want of attention to this discrimination has caused most of the difficulty. But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbours, the extension of wharves into tide-water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds.

This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government; and hence, as the colonies under an empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home, as towns, cities, and corporations do it

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through by-laws for themselves, after the State legislature lays down general principles, and as the war and navy departments and courts of justice make detailed rules under general laws, so here the States, not conflicting with any uniform and general regulations by Congress as to foreign \*commerce, must for convenience, if not necessity, [\*625 from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress. And to hold the power of Congress as to such topics exclusive, in every respect, and prohibitory to the States, though never exercised by Congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial coöperation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial States in the Union.

If this view of the subject conflicts with opinions laid down *obiter* in some of the decisions made by this court (9 Wheat., 209; 12 Id., 438; 16 Pet., 543); it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 5 Wheat., 49; *Willson v. Blackbird Creek Marsh Company*, 2 Pet., 245; 11 Id., 132; 14 Id., 579; 16 Id., 627, 664; 4 Wheat., 196.

But, without going farther into this question, it is enough here to say, that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on, nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard, or between ship and shore; nothing till within the limits of a State, and out of the possession and jurisdiction of the general government.

It is objected, in another view, that such licenses for selling domestic spirit may affect the commerce in it between the States, which by the constitution is placed under the regulation of Congress as much as foreign commerce.

But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress,

instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce. If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), any thing imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighbouring State. And the more especially can it be done from the latter, as \*626] \*imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.

The apprehension that the States, by these license systems, are likely to impair the freedom of trade between each other, is hardly verified by the experience of a half-century. Their conduct has been so liberal and just thus far on this matter as never to have called for the legislation of Congress, which it clearly has the power to make in respect to the commerce between the States, whenever any occasion shall require its interposition to check imprudences or abuses on the part of any one of them towards the citizens of another. Some have objected, next, that these laws violate our foreign treaties, such as those, for example, with Great Britain and Prussia, which stipulate for free ingress and egress as to our ports, as well as for a participation in our interior trade. See 8 Stat. at L., 116, 228, 378. But those arrangements do not profess to exempt their people from local taxation here, or local conformity to license systems, operating, as these State laws do, on their own citizens and their own domestic products in the same way, and to the same extent, as on foreign ones. And neither of those laws in this case forbid access to our ports, or importation into the several States, by the inhabitants of any foreign countries.

In settling the question whether these laws impugn treaties, or regulate either foreign commerce or that between the States, or impose a duty on imports, ordinary justice to the States demands that they be presumed to have meant what they profess till the contrary is shown. Hence, as these laws were passed by States possessing experience, intelligence, and a high tone of morals, it is neither legal nor liberal to attempt to nullify them by any forced construc-

tion, so as to make them regulations of foreign commerce, or measures to collect revenue by a duty on foreign imports, thus imparting to them a character different from that professed by their authors, or from that which, by their provisions and tendency, they appear designed for. These States are as incapable of duplicity or fraud in their laws, of meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other designs, and to construe their legislation as of a sinister character, which they never contemplated. Thus, on the face of them, these laws relate exclusively to the regulation of licensed houses and the sales of an article which, especially where retailed in small quantities, is likely to attract together within the State unusual numbers, and encourage idleness, wastefulness, and drunkenness. To mitigate, if not prevent, this last evil was undoubtedly their real design.

\*From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate, and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social, and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and coöperate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirit.

They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them.

But I go further on this point than some of the court, and wish to meet the case in front, and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a State, as being dangerous to public health and morals, or were virtual taxes on them as State property in a fair ratio with other taxation, it does not seem to me that their conflict with the constitution would, by any means, be clear. Taking for granted, till the contrary appears,

that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things, except where within the limits of State territory, they would appear entirely defensible as a matter of right, though prohibiting sales.

Whether such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the constitution. So, whether they conflict or not indirectly and slightly with some regulations of foreign commerce, after the subject-matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government.

\*628] \*As a general rule, the power of a State over all matters not granted away must be as full in the bays, ports, and harbours within her territory, *intra fauces terræ*, as on wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each State, if we consider the great conservative reserved powers of the States, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

It is conceded that the States may exclude pestilence, either to the body or mind, shut out the plague or cholera, and, no less, obscene paintings, lottery tickets, and convicts. *Holmes v. Jennison et al.*, 14 Pet., 568; 9 Wheat., 203; 11 Pet., 133. How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity? See Vattel, B. 1, ch. 18, §§ 219, 231.

The list of interdicted articles and persons is a long one in most European governments, and, though in some cases not

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License Cases.—Mr. Justice Woodbury's Opinion.

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very judicious or liberal, is in others most commendable; and the exclusion of opium from China is an instance well known in Asia, and kindred in its policy. The introduction and storage of gunpowder in large quantities is one of those articles long regulated and forbidden here. *New York v. Miln*, 11 Pet., 102. Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. 6 Greenl. (Me.), 412; 4 Blackf. (Ind.), 107. See the tariff of 1842; 5 Stat. at L., 566, § 28. And why not cards, dice, and other instruments for gaming, when thought necessary to suppress that vice? In short, on what principle but this rests the justification of the States to prohibit gaming itself, wagers, champerty, forestalling,—not to speak of the debatable cases of usury, marriage brokerage bonds, and many other matters deemed either impolitic or criminal?

It might not comport with the usages or laws of nations to impose mere transit duties on articles or men passing through a State, and however resorted to in some places and on some occasions, it is usually illiberal, as well as injudicious. Vattel, B. 8, ch. 10. And if resorted to here, in respect to the business or imports of citizens of other States, might clearly conflict with some provisions of the constitution conferring on them equal rights, and be a regulation of the commerce between the States, the power over which they have expressly granted to the general government. But the present case is not of that character. Nor would it be, if prohibiting sales within the acknowledged limits of a State, in cases affecting public morals or public health. Nor is there in this case \*any complaint, either by a foreign merchant or foreign [\*629 nation, that treaties are broken; or by any of our own States or by Congress, that its acts or the constitution have been violated.

There are additional illustrations of such powers, existing on general principles in all independent states, given in Puffendorf, B. 8, ch. 5, § 30, as well as in various other writers on national law. And those exercised under what he terms "sovereign or transcendental property" (§ 7th), and those which we class under the right of "eminent domain," are recognized in the fifth amendment to the constitution itself, and go far beyond this.

Much more is there an authority to forbid sales, where an authority exists both to seize and destroy the article itself, as is often the case at quarantine.

So the power to forbid the sale of *things* is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude *persons*. And yet who does

not know that slaves have been prohibited admittance by many of our States, whether coming from their neighbours or abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter?

Nor is there in my view any power conferred on the general government which has a right to control this matter of internal commerce or police, while it is fairly exercised so as to accomplish a legitimate object, and by means adapted legally and suitably to such end alone. New Hampshire has, for many years, made it penal to bring into her limits paupers even from other States; and this is believed to be a power exercised widely in Europe among independent nations, as well as in this country among the States. N. H. Rev. Stat., *Paupers*, 140.

It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary, or hospital, or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, this court has deliberately said,—“We entertain no doubt whatsoever, that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secuse themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.” *Prigg v. Pennsylvania*, 16 Pet., 625.

\*680] \*There may be some doubt whether the general government or each State possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the State. But it must exist somewhere; and it seems to me rather a police power, belonging to the States, and to be exercised in the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the peculiar duties of the general government. Or, if vested in the latter at all, it is but concurrent. Hence, when the latter prohibited the import of obscene prints in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the States, as it opened the door to a prohibition, or to pro-



hibitory duties, to many articles by the general government which some States might desire, but others not wish to come in as competitors to their own manufactures. But, as previously shown, to prohibit sales is not the same power, nominally or in substance, as to prohibit imports.

It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to the public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of States, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits, or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of State sovereignty, and indispensable to public safety. Such extraordinary powers, I concede, are to be exercised with caution, and only when necessary or clearly justifiable in emergencies, on sound and constitutional principles; and, if used too often, or indiscreetly, would open a door to much abuse. But the powers seem clearly to exist in the States, and ought to remain there; and though, in this instance, they are not used to this extent, but still, as respectable minorities within these three States believe not to be useful, and as some other States do not think deserving imitation, yet they are used as the competent and constitutional power within each has judged to be proper for its own welfare, and as does not appear to be repugnant to any part of the constitution, or a treaty, or an act of Congress. They must, therefore, not be interfered with by this court, and the more especially as one reason why these powers have been left with the States is, that the subject-matter of them is better understood by each State than by the Union; and the policy and opinions and usages of one \*State in relation to some of them may [\*631 be very unlike those of others, and therefore require a different system of legislation. Where can such a power also be safer lodged than with those public bodies, or States, who are themselves to be the greatest sufferers in interest and character by an improper use of it? If it should happen at any time to be exercised injudiciously, that circumstance

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License Cases.—Mr. Justice Grier's Opinion.

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would furnish a ground for an appeal rather to the intelligence and prudence of the State, in respect to its modification or repeal, than an authority for this court, by a writ of error, to interfere with the well-considered decision of a State court, and reverse it, and pronounce a State law null and void, merely on that account.

Many State laws are such, that their expediency and justice may be doubted widely, and by this tribunal; but this confers no authority on us to nullify them; nor is any such authority, for such a cause, conferred on Congress by any part of the constitution.

The States stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the constitution or statutes of the general government, our duty to that constitution and laws, and our respect for States rights, must require us not to interfere.

Mr. Justice GRIER.

I concur with my brethren in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the court; and as I concurred mainly with the opinion delivered by Mr. Justice McLean in the case of *Thurlow v. Massachusetts*, I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark, that the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

It has been frequently decided by this court, "that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive." Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of

crime, for the preservation of public peace, health, and morals, must come within this category.

\*As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, "*salus populi suprema lex.*" [\*632]

If the right to control these subjects be "complete, unqualified, and exclusive" in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offences against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.

## ORDER.

*Samuel Thurlow v. The Commonwealth of Massachusetts.*

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court, holden in and for the county of Essex, in the Commonwealth of Massachusetts, and was argued by counsel. On consideration whereof, it \*633] is now here ordered and \*adjudged by this court, that the judgment of the said Supreme Judicial Court in this cause be and the same is hereby affirmed, with costs.

## ORDER.

*Joel Fletcher v. The State of Rhode Island and Providence Plantations.*

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Rhode Island and Providence Plantations, holden at Providence; within and for the county of Providence, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

## ORDER.

*Andrew Peirce, Junior, and Thomas W. Peirce, v. The State of New Hampshire.*

This cause came on to be heard on the transcript of the record from the Superior Court of Judicature in and for the first judicial district of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be and the same is hereby affirmed, with costs.

# INDEX

TO THE

## MATTERS CONTAINED IN THIS VOLUME.

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[The references are to the STAR (\*) pages.]

### ADMIRALTY.

1. The grant in the constitution, extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union. *Waring v. Clarke*, 441.
2. Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject-matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision. *Ib.*
3. The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away. *Ib.*

### AGENT.

1. The acts and declarations of an agent of the government should not be given in evidence without first establishing the agency. Secondary proof of the contents of a letter of appointment should not have been received without first accounting for the non-production of the original. *The United States v. Boyd*, 29.

### AMENDMENT.

1. Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder. *United States v. Boyd*, 29.

### APPEAL.

1. Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed on motion, for want of jurisdiction. *Sewall v. Chamberlain*, 8.

### ARBITRATION.

1. Although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment. *Alexandria Canal Company v. Swann*, 83.
2. So, also, a power to agree with a proprietor for the purchase or use of land includes a power to agree to pay a specified sum, or such sum as arbitrators may fix upon. *Ib.*
3. It is immaterial whether the power of reference is lodged in the president and directors, or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party. *Ib.*
4. Where the order of reference provides for the appointment of an umpire, it is no error if he is appointed before the referees had heard the evidence and discovered that they could not agree. *Ib.*

**ARBITRATION — (Continued.)**

5. Where the agreement for reference contained a clause providing that upon payment of damages to the owner of the land he should convey it to the other party, it was proper for the umpire to omit all notice of this. It was not put in issue by the pleadings, nor referred to the arbitrators. *Ib.*

**ASSUMPSIT.**

1. Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor is a payment at his request, and is an express assumpsit to reimburse the amount. *Hall v. Smith*, 96.
2. Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Ib.*

**BILLS AND NOTES.**

1. When a bill of exchange is made payable at a bank, and the bank itself is the holder of the bill, it is a sufficient demand if the notary presents it at the bank and demands payment. *Hildeburn v. Turner*, 69.
2. If, therefore, the protest states this and also that the notary was answered that it could not be paid, it is sufficient. It is not necessary for him to give the name of the person or officer of the bank to whom it was presented, and by whom he was answered. *Ib.*
3. In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes. But not where the suit is brought upon a collateral contract. *Philips v. Preston*, 278.
4. In the case of *The United States v. The Bank of the United States* (2 How., 711), the court is of opinion that the question on the structure of the bill is an open question, and for the first time presented to this court for decision. *United States v. Bank of United States*, 382.
5. The statute of Maryland of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government. *Ib.*
6. A bill of exchange in form, drawn by one government on another, as this was, is not and cannot be governed by the law merchant, and therefore is not subject to protest and consequential damages. *Ib.*

**BONDS.**

1. The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was. *United States v. Boyd*, 29.
2. The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. *Ib.*
3. The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively. *Ib.*
4. Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the non-production of the original. *Ib.*

See LANDS, PUBLIC.

**CERTIFICATES OF DIVISION.**

1. When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated. *United States v. Briggs*, 208.

## CERTIFICATES OF DIVISION — (Continued.)

2. Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained. *Ib.*

## CHANCERY.

1. Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed, on motion, for want of jurisdiction. *Sewall v. Chamberlain*, 6.
2. Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come, for further proceedings, this is not such a final decree as can be reviewed by this court. The writ of error must be dismissed, on motion. *Pepper v. Dunlap*, 51.
3. It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill. *Nelson v. Hill*, 127.
4. An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself. *Ib.*
5. The creditor of a partnership may, at his option, proceed at law against the surviving partner, or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. *Ib.*
6. Where there were two mercantile firms, and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partners of one of the firms. *Ib.*
7. The general principle with regard to injunctions after a judgment at law is this,—that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. *Truly v. Wanzer*, 141.
8. Hence, where a party had remained for ten years in the undisturbed enjoyment of the property which he purchased, it was no ground for an injunction to stay proceedings for the recovery of the purchase-money, to say that the original purchase was void by the laws of the State, but that he had neglected to urge that defence at law, or to say that he had heard that some persons unknown might possibly at some future time assert a title to the property. *Ib.*
9. Such an injunction, if granted, must be dissolved. *Ib.*
10. By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside. *Ford v. Douglas*, 143.
11. The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below. *Ib.*
12. But if the court below should perpetuate the injunction, upon the defendants' refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve those rights to the creditor, it goes too far, and the judgment of the court below must be reversed. *Ib.*

## CHANCERY—(Continued.)

13. In this case, the pleadings and proofs show that a mortgage executed by the debtor to the creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover. *Gear v. Parish*, 168.
14. As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment. *Ib.*
15. The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. *Creath's Administrator v. Sims*, 192.
16. Therefore, where a complainant prays to be relieved from the fulfilment of a contract, which was intentionally made in fraud of the law, the answer is, that, however unworthy may have been the conduct of his opponent, the parties are *in pari delicto*. The complainant cannot be admitted to plead his own demerits. *Ib.*
17. Nor is it any ground of interference when a complainant applies to be relieved from the payment of a promissory note given under the above circumstances, upon which judgment had been recovered at law. The consideration upon which the note was given was then open to inquiry, and it is a sufficient indulgence to have been permitted once to set up such a defence. *Ib.*
18. The cases examined, showing how far, and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor. *Ib.*
19. Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond. *Ib.*
20. The authorities upon this point examined. *Ib.*
21. By the laws of Alabama, an administrator *de bonis non*, with the will annexed, is liable for assets in the hands of a former executor. *Taylor v. Benham*, 233.
22. Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident or mistake, to make it just to reopen and revise the account after the lapse of twenty years and the death of the parties concerned. *Ib.*
23. Where a person who held land as trustee directed by his will that the whole of the property that he may die seized and possessed of, or may be in any wise belonging to him, should be sold, the executors had power to sell the land held in trust, as well as that belonging to the testator in his own right. *Ib.*
24. The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original *cestui que trust*. *Ib.*
25. The power in the executors to sell was a power coupled with a trust. *Ib.*
26. It might also be considered as a power coupled with an interest. *Ib.*
27. The distinction between these powers adverted to. *Ib.*
28. In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the *cestui que trust*. *Ib.*
29. Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise



CHANCERY—(Continued.)

- and not by descent, although they were supposed to be also the *cestui que trusts*. *Ib.*
30. If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does. *Ib.*
31. The testator, who held the lands as trustee, having died in South Carolina, the executor took out letters testamentary in that State, sold the lands which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary. *Ib.*
32. Having sold the lands and received the consideration, he must be responsible to the residuary legatees. *Ib.*
33. An objection that only one executor sold (there having originally been four) cannot be sustained. Where a power is coupled with a trust, it is only necessary to show such a case as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust. *Ib.*
34. A power to sell, coupled either with an interest or trust, survives to the surviving executor. So, also, if all the trustees or executors in such a case decline to act, except one. *Ib.*
35. When a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute. *Ib.*
36. The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase-money being received by him, he is responsible to the *cestui que trusts* for the money thus received. The reception of an additional sum, as purchase-money, by them, with a reservation of the right to sue the executor, is not an avoidance of the first sale by the executor. *Ib.*
37. But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence or wilful default. A claim for damages would also be subject to the operation of the statute of limitations. *Ib.*
38. If the executor himself did not set up a claim, as an offset, for his personal expenses, his representative cannot do it, under the circumstances of this case. *Ib.*
39. The *cestui que trusts* residing in a foreign country, the statute of limitations did not begin to run until a demand was made upon the executor for the money. His retaining it during that time is no evidence that he did not intend to account for it. *Ib.*
40. Although the bill made no distinction between the two characters in which the executor acted, namely, as executor proper, and as executor having a power coupled with a trust, yet as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged upon which the claim rests. *Ib.*

COLLISION.

1. In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, courts of admiralty of the United States have jurisdiction. *Waring v. Clarke*, 441.

COMMERCIAL LAW.

1. By the laws of Louisiana, a notary is required to record in a book kept for that purpose all protests of bills made by him and the notices given to the drawers or indorsers, a certified copy of which record is made evidence. *McAfee v. Doremus*, 53.
2. Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment, a subsequent protest, and notice to the drawers and indorsers respectively, is good evidence. *Ib.*

## COMMERCIAL LAW—(Continued.)

3. The original protest must be recorded in a book. Its absence at the trial is therefore sufficiently accounted for. *Ib.*
4. Where a joint action against the drawers and indorser was commenced under the statute of Mississippi (which statute this court has heretofore, 16 Pet., 89, held to be repugnant to an act of Congress), the plaintiffs may discontinue the suit against the drawers and proceed against the indorser only. *Ib.*
5. When a bill of exchange is made payable at a bank, and the bank itself is the holder of the bill, it is a sufficient demand if the notary presents it at the bank and demands payment. *Hildebrand v. Turner*, 69.
6. If, therefore, the protest states this, and also that the notary was answered that it could not be paid, it is sufficient. It is not necessary for him to give the name of the person or officer of the bank to whom it was presented, and by whom he was answered. *Ib.*
7. It is not irregular for two mercantile firms to unite as complainants in a creditor's bill. *Nelson v. Hill*, 127.
8. The creditor of a partnership may, at his option, proceed at law against the surviving partner, or go, in the first instance, into equity against the representative of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. *Ib.*
9. Where there were two mercantile firms, and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partner of one of the firms. *Ib.*
10. In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes. *Phillips v. Preston*, 278.
11. But not where the suit is brought upon a collateral contract. *Ib.*
12. A contract between two indorsers, that they will divide the loss between them, is a good contract, and founded on a sufficient consideration. *Ib.*
13. Being a collateral contract, by parol, parol evidence can be given to prove it. The payee is a competent witness, and so is the notary, bringing with him the act of sale. *Ib.*
14. In the case of *The United States v. The Bank of the United States* (2 How., 711), the court is of opinion that the question on the structure of the bill is an open question, and for the first time presented to this court for decision. *The United States v. The Bank of the United States*, 382.
15. The statute of Maryland of 1786, in its terms, does not embrace a bill of exchange drawn on a foreign government. *Ib.*
16. A bill of exchange in form, drawn by one government on another, as this was, is not and cannot be governed by the law merchant, and therefore is not subject to protest and consequential damages. *Ib.*

## CONSTITUTIONAL LAW.

1. In the case of *Groves v. Slaughter* (15 Pet., 449), this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale. *Rowan v. Runnels*, 134. *Truly v. Wanzer*, 141.
2. This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case. *Ib.*
3. This court adheres to the construction of the constitution which was given in the case of *Groves v. Slaughter*, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of *Groves v. Slaughter*, declared such contracts to be void. *Ib.*
4. Under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their

CONSTITUTIONAL LAW—(Continued.)

- master, on a charge for harbouring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act. *Jones v. Van Zandt*, 215.
5. Such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent to the person who harbours or conceals the fugitive; and, to charge him under the statute, a general notice to the public in a newspaper is not necessary. *Ib.*
6. Clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice. *Ib.*
7. Receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harbouring or concealing of the fugitive within the statute. *Ib.*
8. A transportation under the above circumstances, though the boy should be recaptured by his master, is a harbouring or concealing of him within the statute. *Ib.*
9. Such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harbouring of him within the statute. *Ib.*
10. A claim of the fugitive from the person harbouring or concealing him need not precede or accompany the notice. *Ib.*
11. Any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute. *Ib.*
12. In this particular case, the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio. *Ib.*
13. They also contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress. *Ib.*
14. The averments in the said counts, that the defendant harboured said Andrew, are sufficient. *Ib.*
15. Said counts are otherwise sufficient. *Ib.*
16. The act of Congress, approved February 12, 1793, is not repugnant to the constitution of the United States. *Ib.*
17. The said act is not repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An Ordinance for the Government of the Territory of the United States northwest of the River Ohio." *Ib.*
18. A contract, made in New York, is not affected by a discharge of the debtor under the insolvent laws of Maryland, where the debtor resided, although the insolvent law was passed antecedently to the contract. *Cook v. Moffat*, 296.
19. The prior decisions of this court upon this subject reviewed and examined. *Ib.*
20. In the case of the *United States v. The Bank of the United States* (2 How., 711), the court is of opinion that the question on the structure of the bill is an open question, and for the first time presented to this court for decision. *The United States v. The Bank of the United States*, 382.
21. The statute of Maryland of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government. *Ib.*
22. A bill of exchange in form, drawn by one government on another, as this

## CONSTITUTIONAL LAW—(Continued.)

- was, is not and cannot be governed by the law merchant, and therefore is not subject to protest and consequential damages. *Ib.*
23. The power conferred upon Congress by the fifth and sixth clauses of the eighth section of the first article of the constitution of the United States, viz.:—"To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures"; "To provide for the punishment of counterfeiting the securities and current coin of the United States";—does not prevent a State from passing a law to punish the offence of circulating counterfeit coin of the United States. *For v. The State of Ohio*, 410.
  24. The two offences of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offence directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached. *Ib.*
  25. The prohibitions contained in the amendments to the constitution were intended to be restrictions upon the federal government, and not upon the authority of the States. *Ib.*
  26. The grant in the constitution, extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union. *Waring v. Clarke*, 441.
  27. Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject-matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision. *Ib.*
  28. In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, courts of admiralty of the United States have jurisdiction. *Ib.*
  29. The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away. *Ib.*
  30. The act of 7th July, 1838 (5 Stat. at L., 304), for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, is obligatory in all its provisions, except as it has been altered by the act of 1843 (5 Stat. at L., 626), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State, or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States. *Ib.*
  31. By the law of 7th July, 1838, masters and owners neglecting to comply with its conditions are liable to a penalty of two hundred dollars, to be recovered by suit or indictment. And if neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it. *Ib.*
  32. Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted. *License Cases*, 504.
  33. Of Rhode Island, forbidding the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted from the original importer. *Ib.*

CONSTITUTIONAL LAW—(Continued.)

34. *M* New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge, and there sold in the same barrel. *Ib*.
35. All adjudged to be not inconsistent with any of the provisions of the constitution of the United States or acts of Congress under it. *Ib*.

CORPORATION.

1. Although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment. *Alexandria Canal Company v. Swann*, 83.
2. So, also, a power to agree with a proprietor for the purchase or use of land includes a power to agree to pay a specified sum, or such sum as arbitrators may fix upon. *Ib*.
3. It is immaterial whether the power of reference is lodged in the president and directors, or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party. *Ib*.

COSTS.

1. If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs. *The United States v. Boyd*, 30.

COUNTERFEITING.

1. The power conferred upon Congress by the fifth and sixth clauses of the eighth section of the first article of the constitution of the United States, viz.:—"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures"; "To provide for the punishment of counterfeiting the securities and current coin of the United States";—does not prevent a State from passing a law to punish the offence of circulating counterfeit coin of the United States. *Fox v. State of Ohio*, 410.
2. The two offences of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offence directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached. *Ib*.

CREDITOR'S SUIT.

1. It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill. *Nelson v. Hill*, 127.

DEBTOR AND CREDITOR.

1. Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor, is a payment at his request, and is an express assumpsit to reimburse the amount. *Hall v. Smith*, 96.
2. In this case, the pleadings and proofs show that a mortgage executed by the debtor to the creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover. *Gear v. Parish*, 168.
3. As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment. *Ib*.

DEPOSITIONS.

1. By the 30th section of the Judiciary Act of 1789 (1 Stat. at L., 88), depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken. *Dick v. Runnels*, 7.
2. A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred miles of such place, and that therefore no notice was made out, is suffi-

## DEPOSITIONS—(Continued.)

cient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good. *Ib.*

3. If either of the two facts, viz., that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void. *Ib.*

## EQUITY.

1. The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. *Oreath's Adm. v. Sims*, 192.
2. Therefore, when a complainant prays to be relieved from the fulfilment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are *in pari delicto*. The complainant cannot be admitted to plead his own demerits. *Ib.*
3. Nor is it any ground of interference when a complainant applies to be relieved from the payment of a promissory note given under the above circumstances, upon which judgment had been recovered at law. The consideration upon which the note was given was then open to inquiry, and it is a sufficient indulgence to have been permitted once to set up such a defence. *Ib.*
4. The cases examined, showing how far and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor. *Ib.*

## ERROR, WRIT OF.

1. Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court. *Pepper v. Dunlap*, 51.
2. The writ of error must be dismissed, on motion.
3. Where the plaintiff below claimed a ferry right under an act of the legislature of Kentucky, and the ground of defence was that the act was unconstitutional and void as impairing vested rights, and the decision of the highest State court was against the plaintiff, a writ of error, issued under the 26th section of the judiciary act, will not lie. *Walker v. Taylor*, 64.
4. This court can entertain jurisdiction under that section only when the decision of the State court is in favor of the validity of such a statute. Here, the decision was against its validity. *Ib.*
5. The judgments of a Circuit Court can be reviewed only when the matter in dispute exceeds the sum or value of two thousand dollars. It must have a known and certain value which can be proved and calculated in the ordinary mode of business transactions. *Barry v. Mercein*, 103.
6. But a controversy between a father and mother, each claiming the right to the custody, care, and society of their child, relates to a matter in dispute which is incapable of being reduced to any pecuniary standard of value. *Ib.*
7. Under the acts of 1839, chap. 20 (5 Statutes at Large, 315), and 1840, chap. 43 (5 Statutes at Large, 392), where a case was carried from the District Court for the Middle District of Alabama to the Circuit Court for the Southern District of Alabama, and the Circuit Court reversed the judgment of the District Court, it was not a proper mode of proceeding to bring the case to this court upon such reversal. *Mayberry v. Thompson*, 121.

## ERROR, WRIT OF—(Continued.)

8. The judgment of the District Court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. This court could then have reëxamined the judgment of the Circuit Court, if a writ of error were sued out. *Ib.*
9. Where a writ of error was allowed, the citation signed, and the bond approved, by the chief justice of the Territorial court of Iowa, it was a sufficient compliance with the statutes of the United States. *Shepard v. Wilson*, 210.
10. Under the acts of 1789 and 1792, the clerk of the Circuit Court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation, and approve the bond. *Ib.*
11. The act of 1838, providing that writs of error, and appeals from the final decision of the Supreme Court of the Territory, shall be allowed in the same manner and under the same regulations as from the Circuit Court of the United States, gives to the clerk of the Territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond. *Ib.*
12. A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court. Information in the nature of a *quo warranto*, calling upon the President, Directors, and Company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise. Plea, referring to an act of incorporation. Replication, that the act of incorporation had been repealed. Rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise. Demurrer to the rejoinder. Joinder in demurrer. Sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment. The writ of error must, upon motion, be dismissed. *Miners' Bank v. United States*. 213.
13. Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them. *Phillips v. Preston*, 278.
14. Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal. *Ib.*
15. The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error. *Ib.*
16. Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing. *Ib.*
17. A citation is not necessarily a part of the record, and the fact of its having been issued and served may be proved *aliunde*. *Innerarity v. Byrne*, 296.
18. To bring a case to this court from the highest court of a State, under the twenty-fifth section of the Judiciary Act, it must appear on the face of the record,—1st. That some of the questions stated in that section did arise in the State court; and, 2d. That the question was decided in the State court, as required in the section. *Commercial Bank v. Buckingham*, 317.
19. It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have

**ERROR, WRIT OF—(Continued.)**

- been raised, and must have been decided, in order to induce the judgment. *Ib.*
20. Hence, where the legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the State court was, whether or not some of the provisions of the act of 1824 applied to the bank subsequently chartered, the question was one of construction of the State statutes, and not of their validity. *Ib.*
21. This court has no jurisdiction over such a case. *Ib.*
22. An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of Congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject. *Scott v. Jones*, 343.
23. In order to give this court jurisdiction, the statute the validity of which is drawn in question must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its constitution and laws. *Ib.*
24. If public bodies, not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting. *Ib.*
25. But their measures are not examinable by this court on a writ of error. They are not a State, and cannot pass statutes within the meaning of the Judiciary Act. *Ib.*

**EVIDENCE.**

1. The acts and declarations of an agent of the government should not be given in evidence without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the non-production of the original. *The United States v. Boyd*, 29.
2. A party upon the record, although divested of all interest in the event of the suit, is not a competent witness in a cause. *Bridges v. Armour*, 91.
3. If a person be declared a bankrupt at a time when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. His liability for costs, therefore, excludes him as a witness upon the ground of interest. *Ib.*
4. If the event of the suit may increase the effects of the bankrupt in the hands of the assignee, and thus increase the surplus which would belong to him, he is an incompetent witness. *Ib.*
5. By the laws of Louisiana, a notary is required to record in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers, a certified copy of which record is made evidence. *McAfee v. Doremus*, 53.
6. Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment; a subsequent protest and notice to the drawers and indorsers respectively, is good evidence. *Ib.*
7. The original protest must be recorded in a book. Its absence at the trial is therefore sufficiently accounted for. *Ib.*

**EXECUTORS AND ADMINISTRATORS.**

1. By the laws of Alabama, an administrator *de bonis non*, with the will annexed, is liable for assets in the hands of a former executor. *Taylor v. Benham*, 233.
2. Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident or mistake, to make it just to reopen and revise the account after the lapse of twenty years and the death of the parties concerned. *Ib.*



## EXECUTORS AND ADMINISTRATORS—(Continued.)

3. Where a person who held land as trustee directed by his will that the whole of the property that he may die seised and possessed of, or may be in any wise belonging to him, should be sold, the executors had power to sell the land held in trust, as well as that belonging to the testator in his own right. *Ib.*
4. The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original *cestui que trust*. *Ib.*
5. The power in the executors to sell was a power coupled with a trust. *Ib.*
6. It might also be considered as a power coupled with an interest. *Ib.*
7. The distinction between these powers adverted to. *Ib.*
8. In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the *cestui que trust*. *Ib.*
9. Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise and not by descent, although they were supposed to be also the *cestui que trusts*. *Ib.*
10. If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does. *Ib.*
11. The testator, who held the lands as trustee, having died in South Carolina, the executor took out letters testamentary in that State, sold the lands which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary. *Ib.*
12. Having sold the lands and received the consideration, he must be responsible to the residuary legatees. *Ib.*
13. An objection that only one executor sold (there having originally been four) cannot be sustained. Where a power is coupled with a trust, it is only necessary to show such a case as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust. *Ib.*
14. A power to sell, coupled either with an interest or trust, survives to the surviving executor. So, also, if all the trustees or executors in such a case decline to act, except one. *Ib.*
15. When a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute. *Ib.*
16. The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase-money being received by him, he is responsible to the *cestui que trusts* for the money thus received. The reception of an additional sum, as purchase-money, by them, with a reservation of the right to sue the executor, is not an avoidance of the first sale by the executor. *Ib.*
17. But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence or wilful default. A claim for damages would also be subject to the operation of the statute of limitations. *Ib.*
18. If the executor himself did not set up a claim, as an offset, for his personal expenses, his representative cannot do it, under the circumstances of this case. *Ib.*
19. The *cestui que trusts* residing in a foreign country, the statute of limitations did not begin to run until a demand was made upon the executor for the money. His retaining it during that time is no evidence that he did not intend to account for it. *Ib.*

**EXECUTORS AND ADMINISTRATORS—(Continued.)**

20. Although the bill made no distinction between the two characters in which the executor acted, namely, as executor proper, and as executor having a power coupled with a trust, yet as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged upon which the claim rests. *Ib.*

**EXTRADITION.**

1. The treaty with France, made in 1843, provides for the mutual surrender of fugitives from justice, in certain cases. *In the matter of Metzger*, 176.
2. Where a district judge, at his chambers, decided that there was sufficient cause for the surrender of a person claimed by the French government, and committed him to custody to await the order of the President of the United States, this court has no jurisdiction to issue a *habeas corpus* for the purpose of reviewing that decision. *Ib.*

**FLORIDA.**

See LANDS, PUBLIC.

**FUGITIVES.**

See EXTRADITION; SLAVES.

**HABEAS CORPUS.**

1. This court has no appellate power, in a case where the Circuit Court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother. *Barry v. Mercein*, 103.

**INSOLVENCY.**

1. A contract, made in New York, is not affected by a discharge of the debtor under the insolvent laws of Maryland, where the debtor resided, although the insolvent law was passed antecedently to the contract. The prior decisions of this court upon this subject reviewed and examined. *Cook v. Moffat*, 295.

**JUDICIAL SALE.**

1. By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside. *Ford v. Douglas*, 143.
2. The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below. *Ib.*
3. But if the court below should perpetuate the injunction, upon the defendants' refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve these rights to the creditor, it goes too far, and the judgment of the court below must be reversed. *Ib.*

**JURISDICTION.**

1. Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed, on motion, for want of jurisdiction. *Sewall v. Chamberlain*, 6.
2. Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court. The writ of error must be dismissed, on motion. *Pepper v. Dunlap*, 51.
3. Where the plaintiff below claimed a ferry right under an act of the legislature of Kentucky, and the ground of defence was, that the act was

## JURISDICTION—(Continued.)

- unconstitutional and void as impairing vested rights, and the decision of the highest State court was against the plaintiff, a writ of error, issued under the twenty-fifth section of the Judiciary Act, will not lie. *Walker v. Taylor*, 64.
4. This court can entertain jurisdiction under that section only when the decision of the State court is in favor of the validity of such a statute. Here, the decision was against its validity. *Ib.*
  5. This court has no appellate power, in a case where the Circuit Court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother. *Barry v. Mercein*, 103.
  6. The judgments of a Circuit Court can be reviewed only where the matter in dispute exceeds the sum or value of two thousand dollars. It must have a known and certain value, which can be proved and calculated in the ordinary mode of business transactions. *Ib.*
  7. But a controversy between a father and mother, each claiming the right to the custody, care, and society of their child, relates to a matter in dispute which is incapable of being reduced to any pecuniary standard of value. *Ib.*
  8. The writ of error must be dismissed for want of jurisdiction. *Ib.*
  9. Under the acts of 1839, chap. 20 (5 Stat. at L., 315), and 1840, chap. 43 (5 Stat. at L., 392), where a case was carried from the District Court for the Middle District of Alabama to the Circuit Court for the Southern District of Alabama, and the Circuit Court reversed the judgment of the District Court, it was not a proper mode of proceeding to bring the case to this court upon such reversal. *Mayberry v. Thompson*, 121.
  10. The judgment of the District Court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. This court could then have reexamined the judgment of the Circuit Court, if a writ of error were sued out. *Ib.*
  11. The treaty with France, made in 1843, provides for the mutual surrender of fugitives from justice, in certain cases. *Ex parte Metzger*, 176.
  12. Where a district judge, at his chambers, decided that there was sufficient cause for the surrender of a person claimed by the French government, and committed him to custody to await the order of the President of the United States, this court has no jurisdiction to issue a *habeas corpus* for the purpose of reviewing that decision, *Ib.*
  13. When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated. *United States v. Briggs*, 208.
  14. Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained. *Ib.*
  15. A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court. *Miners' Bank of Dubuque v. The United States*, 213.
  16. Information in the nature of a *quo warranto*, calling upon the President, Directors, and Company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise. *Ib.*
  17. Plea, referring to an act of incorporation. *Ib.*
  18. Replication, that the act of incorporation had been repealed. *Ib.*
  19. Rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise. *Ib.*
  20. Demurrer to the rejoinder. *Ib.*
  21. Joinder in demurrer. *Ib.*
  22. Sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment. *Ib.*
  23. The writ of error must, upon motion, be dismissed. *Ib.*
  24. In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear

## JURISDICTION—(Continued.)

- half the loss which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes. *Phillips v. Preston*, 278.
25. But not where the suit is brought upon a collateral contract. *Ib.*
26. To bring a case to this court from the highest court of a State, under the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, — 1st. That some of the questions stated in that section did arise in the State court; and, 2d. That the question was decided in the State court, as required in the section. *Commercial Bank v. Buckingham*, 317.
27. It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. *Ib.*
28. Hence, when the legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the State court was, whether or not some of the provisions of the act of 1824 applied to the bank subsequently chartered, the question was one of construction of the State statutes, and not of their validity. *Ib.*
29. This court has no jurisdiction over such a case. *Ib.*
30. An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of Congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject. *Scott v. Jones*, 343.
31. In order to give this court jurisdiction, the statute the validity of which is drawn in question must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its constitution and laws. *Ib.*
32. If public bodies, not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting. *Ib.*
33. But their measures are not examinable by this court on a writ of error. They are not a State, and cannot pass statutes within the meaning of the Judiciary Act. *Ib.*

## JURY.

1. The sufficiency of the description in patents for machines, or for a new composition of matter, where any of the ingredients do not always possess exactly the same properties in the same degree, is, generally, a question of fact to be determined by the jury. *Wood v. Underhill*, 1.
2. The court should have left it to the jury to say, from the evidence of persons skilled in the art, whether the description contained in a patent for an improvement in the art of making brick was clear and exact enough to enable such persons to compound and use the invention. *Ib.*

## LANDS, PUBLIC.

1. A Spanish grant of land in Florida, for six miles square, "at the place called Dunn's lake, upon the river St. John's," is too vague to be confirmed, even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water-power. *United States v. Lawton*, 10.
2. The river St. John's meanders so much that it is near Dunn's lake for

**LANDS, PUBLIC—(Continued.)**

- thirty miles. The survey might therefore commence at any point of this distance with as much propriety as at any other point. *Ib.*
3. This concession cannot be distinguished from various others which have been brought before this court. The land granted was not severed from the king's domain. It remained a floating grant, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land. *Ib.*
  4. Nor is the grant in this case aided by two surveys, one purporting to have been made in December, 1817, and the other in the spring of 1818. The first must have been fictitious, not actually made upon the ground, but merely upon paper; and the second was too imperfect to be effectual. *Ib.*
  5. Previous to the act of May 26, 1824, Congress alone could act upon these incipient titles. By that act power was given to the court to pass a decree for the land, provided its locality, extent, and boundaries could be found. But, in the present case, this cannot be done. *Ib.*
  6. The act of Congress, passed on the 24th of April, 1820 (3 Statutes at Large, 566), which substituted cash payments in lieu of credit, sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government. *United States v. Boyd*, 29.
  7. The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was. *Ib.*
  8. The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. *Ib.*
  9. An instruction given by the court below,—viz., that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government, to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void,—was erroneous. *Ib.*
  10. The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively. *Ib.*
  11. Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the non-production of the original. *Ib.*

**LEX LOCI.**

1. Where a case is removed from Alexandria county to Washington county, in the District of Columbia, whatever defences might have been made in Alexandria county, either as to the form of the action or upon any other ground, or whatever would have been a bar to the action, may all be relied upon in the new forum. *Alexandria Canal Co. v. Swann*, 83.
2. But the mode of proceeding, by which the rights of the parties are determined, must be regulated by the law of the court to which the suit is transferred. *Ib.*
3. A reference to arbitrators, therefore, which is sanctioned by the laws of Maryland, governing Washington county, is not to be overthrown because it is not sanctioned by the laws of Virginia, governing Alexandria county. *Ib.*
4. The validity of the reference, and of the proceedings and judgment upon it, must be tested by the laws of Maryland. *Ib.*
5. A testator who held lands as a trustee having died in South Carolina, the executor took out letters testamentary in that State, sold the lands,

## LEX LOCI—(Continued.)

which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary. *Taylor v. Benham*, 233.

## LICENSE LAWS.

1. Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted. *License Cases*, 504.
2. Of Rhode Island, forbidding the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted from the original importer. *Ib.*
3. Of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge and there sold in the same barrel. *Ib.*
4. All adjudged to be not inconsistent with any of the provisions of the constitution of the United States or acts of Congress under it. *Ib.*

## LOUISIANA.

1. By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside. *Ford v. Douglas*, 143.
2. The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below. *Ib.*
3. But if the court below should perpetuate the injunction, upon the defendant's refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve these rights to the creditor, it goes too far, and the judgment of the court below must be reversed. *Ib.*
4. Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them. *Phillips v. Preston*, 278.
5. Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment, and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal. *Ib.*
6. The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error. *Ib.*
7. Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing. *Ib.*

## MISSISSIPPI.

1. In the case of *Groves v. Slaughter* (15 Pet., 449) this court decided that the constitution of Mississippi did not, of itself, and without any legis-

**MISSISSIPPI—(Continued.)**

- lative enactment, prohibit the introduction of slaves as merchandise and for sale. *Rowan v. Runnels*, 134; *Truly v. Wanzer*, 141.
2. This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case. *Ib.*
3. This court adheres to the construction of the constitution which was given in the case of *Groves v. Slaughter*, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of *Groves v. Slaughter*, declared such contracts to be void. *Ib.*

**PARTNERSHIP.**

1. The creditor of a partnership may, at his option, proceed at law against the surviving partner or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. *Nelson v. Hill*, 127.
2. Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms and also against the surviving partner of one of the firms. *Ib.*

**PATENTS.**

1. In order to obtain a patent, the specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention, without making any experiments of his own. *Wood v. Underhill*, 1.
2. If the patent be for a new composition of matter, and no relative proportions of the ingredients are given, or they are stated so ambiguously and vaguely that no one could use the invention without first ascertaining, by experiment, the exact proportion required to produce the result, it would be the duty of the court to declare the patent void. *Ib.*
3. But the sufficiency of the description in patents for machines, or for a new composition of matter where any of the ingredients do not always possess exactly the same properties in the same degree, is generally a question of fact to be determined by the jury. *Ib.*
4. Where a patent was obtained for a new improvement in the mode of making brick, tile, and other clay ware, and the process described in the specification was, to mix pulverized anthracite coal with the clay before moulding it, in the proportion of three fourths of a bushel of coal-dust to one thousand brick, some clay requiring one eighth more, and some not exceeding half a bushel, this degree of vagueness and uncertainty was not sufficient to justify the court below in declaring the patent void. *Ib.*
5. The court should have left it to the jury to say, from the evidence of persons skilled in the art, whether the description was clear and exact enough to enable such persons to compound and use the invention. *Ib.*

**PLEAS AND PLEADINGS.**

1. Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder. *United States v. Boyd*, 30.

**PRACTICE.**

1. Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed, on motion, for want of jurisdiction. *Sewall v. Chamberlain*, 8.
2. By the thirtieth section of the Judiciary Act of 1789 (1 Stat. at L., 88), depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken. *Dick v. Runnels*, 7.

## PRACTICE—(Continued.)

3. A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred miles of such place, and that therefore no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good. *Ib.*
4. If either of the two facts, viz. that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void. *Ib.*
5. Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder. *United States v. Boyd*, 30.
6. If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs. *Ib.*
7. Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court. *Pepper v. Dunlap*, 51.  
The writ of error must be dismissed, on motion. *Ib.*
9. Under the acts of 1839 and 1840, where a case was carried from the District Court for the Middle District of Alabama to the Circuit Court for the Southern District of Alabama, and the Circuit Court reversed the judgment of the District Court, it was not a proper mode of proceeding to bring the case to this court upon such reversal. *Mayberry v. Thompson*, 121.
10. The judgment of the District Court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. This court could then have reexamined the judgment of the Circuit Court, if a writ of error were sued out. *Ib.*
11. When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated. *The United States v. Briggs*, 208.
12. Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained. *Ib.*
13. Where a writ of error was allowed, the citation signed, and the bond approved, by the chief justice of the Territorial court of Iowa, it was a sufficient compliance with the statutes of the United States. *Sheppard v. Wilson*, 210.
14. Under the acts of 1789 and 1792, the clerk of the Circuit Court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation, and approve the bond. *Ib.*
15. The act of 1838, providing that writs of error and appeals from the final decision of the Supreme Court of the Territory shall be allowed in the same manner and under the same regulations as from the Circuit Courts of the United States, gives to the clerk of the Territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond. *Ib.*
16. A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court. *Miners' Bank of Dubuque v. United States*, 213.
17. Information in the nature of a *quo warranto*, calling upon the President, Directors, and Company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise. *Ib.*



PRACTICE—(Continued.)

18. Plea, referring to an act of incorporation. *Ib.*
19. Replication, that the act of incorporation had been repealed. *Ib.*
20. Rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise. *Ib.*
21. Demurrer to the rejoinder. *Ib.*
22. Joinder in demurrer. *Ib.*
23. Sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment. *Ib.*
24. The writ of error must, upon motion, be dismissed. *Ib.*
25. Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them. *Phillips v. Preston*, 278.
26. Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment, and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal. *Ib.*
27. The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error. *Ib.*
28. Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing. *Ib.*
29. A citation is not necessarily a part of the record, and the fact of its having been issued and served may be proved *aliunde*. *Innerarity v. Byrne*, 295.

PRINCIPAL AND SURETY.

1. Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Hall v. Smith*, 96.
2. Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond. *Creath's Adm. v. Sims*, 192.

QUESTIONS OF LAW AND FACT.

1. The court should have left it to the jury to say, from the evidence of persons skilled in the art, whether the description was clear and exact enough to enable such persons to compound and use the invention. *Wood v. Underhill*, 1.

RECEIVER OF PUBLIC MONEY.

See LANDS, PUBLIC.

REMOVAL OF CAUSES.

1. Where a case is removed from Alexandria county to Washington county, in the District of Columbia, whatever defences might have been made in Alexandria county, either as to the form of the action or upon any other ground, or whatever would have been a bar to the action, may all be relied upon in the new forum. *Alexandria Canal Co. v. Swann*, 83.

SLAVES.

1. Under a statute of Maryland, passed in 1796, a deed of manumission is not good unless recorded within six months after its date; and this law is in force in Washington county, District of Columbia. *Miller v. Herbert*, 72.
2. The statutes and decisions of Maryland examined. *Ib.*

## SLAVES—(Continued.)

3. Under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harbouring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act. *Jones v. Van Zandt*, 215.
4. Such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent to the person who harbours or conceals the fugitive; and to charge him under the statute a general notice to the public in a newspaper is not necessary. *Ib.*
5. Clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice. *Ib.*
6. Receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harbouring or concealing of the fugitive within the statute. *Ib.*
7. A transportation under the above circumstances, though the boy should be recaptured by his master, is a harbouring or concealing of him within the statute. *Ib.*
8. Such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harbouring of him within the statute. *Ib.*
9. A claim of the fugitive from the person harbouring or concealing him need not precede or accompany the notice. *Ib.*
10. Any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute. *Ib.*
11. In this particular case, the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio. *Ib.*
12. They also contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress. *Ib.*
13. The averments in the said counts, that the defendant harboured said Andrew, are sufficient. *Ib.*
14. Said counts are otherwise sufficient. *Ib.*
15. The act of Congress, approved February 12, 1793, is not repugnant to the constitution of the United States. *Ib.*
16. The said act is not repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An Ordinance for the Government of the Territory of the United States northwest of the River Ohio." *Ib.*
17. In the case of *Groves v. Slaughter* (15 Pet., 449) this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale. *Rowan v. Runnels*, 134.
18. This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case. *Ib.*
19. This court adheres to the construction of the constitution which was given in the case of *Groves v. Slaughter*, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of *Groves v. Slaughter*, declared such contracts to be void. *Ib.*

## SPANISH GRANTS.

See LANDS, PUBLIC.

**SPECIFICATION.**

See **PATENTS.**

**STEAMBOATS.**

1. The grant in the constitution, extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union. *Waring v. Clarke*, 441.
2. Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject-matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision. *Ib.*
3. In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, courts of admiralty of the United States have jurisdiction. *Ib.*
4. The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away. *Ib.*
5. The act of 7th July, 1838 (5 Statutes at Large, 304), for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, is obligatory in all its provisions, except as it has been altered by the act of 1843 (5 Statutes at Large, 826), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State, or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States. *Ib.*
6. By the law of 7th July, 1838, masters and owners neglecting to comply with its conditions are liable to a penalty of two hundred dollars, to be recovered by suit or indictment. And if neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it. *Ib.*

**SURETIES.**

1. The sureties of a receiver of the public money cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. *United States v. Boyd*, 29.
2. The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was. *Ib.*
3. Where there are privies in a contract, with the knowledge of a debtor, to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor is a payment at his request, and is an express assumpsit to reimburse the amount. *Hall v. Smith*, 98.
4. Where the surety of a surety pays the debt of the principal, under a legal obligation from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Ib.*
5. The cases examined, showing how far and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor. *Creath's Administrator v. Sims*, 192.
6. Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever

**SURETIES—(Continued.)**

it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond. *Ib.*

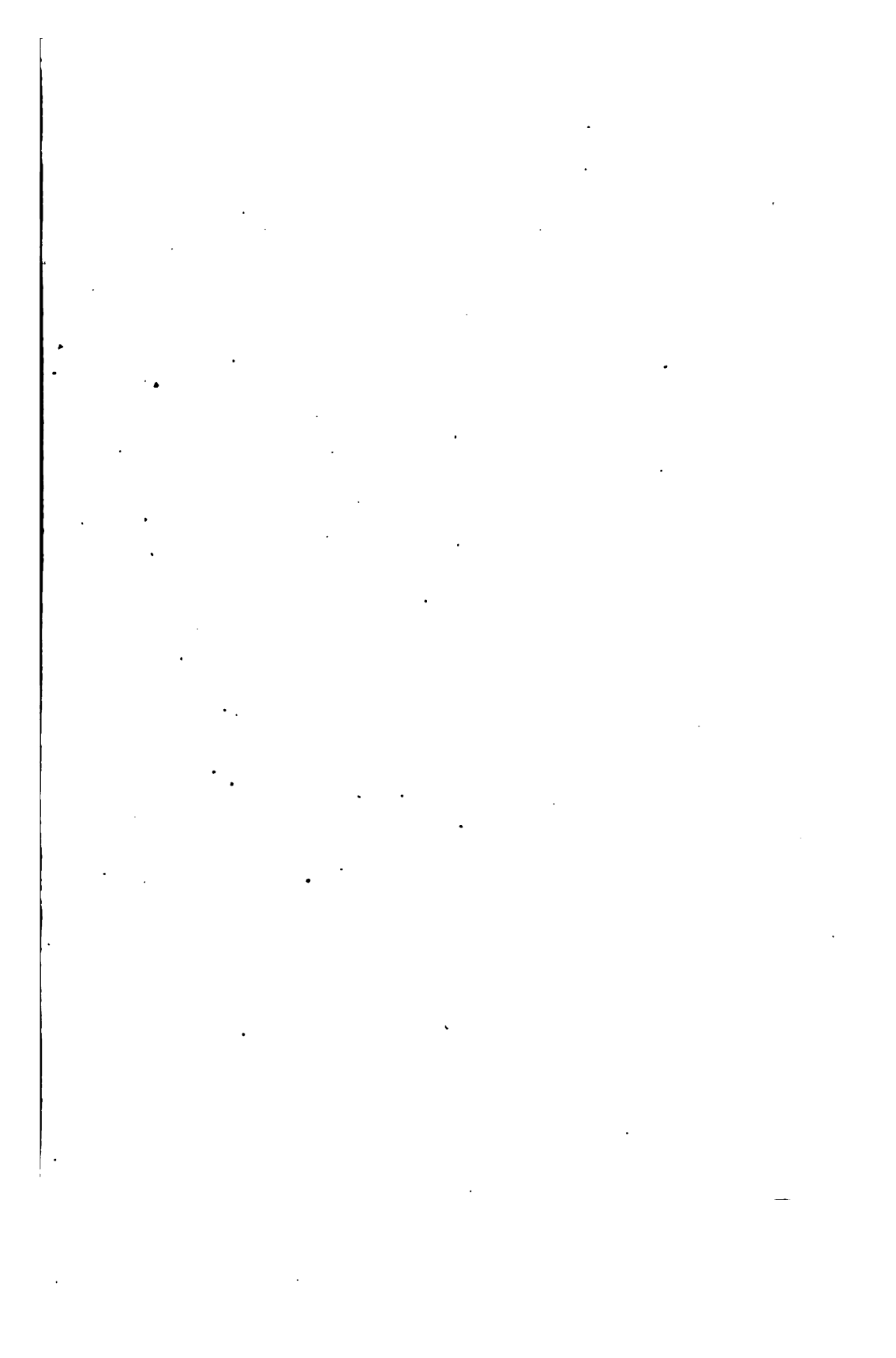
7. The authorities upon this point examined. *Ib.*

**WILLS.**

1. The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original *cestui que trust*. *Taylor v. Benham*, 233.

**WRIT OF ERROR.**

See **ERROR.**















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